

A CONCISE HISTORY OF THE LAW
OF NATIONS



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A CONCISE HISTORY OF THE LAW OF NATIONS

by

ARTHUR NUSSBAUM

RESEARCH PROFESSOR OF PUBLIC LAW (ret.)
COLUMBIA UNIVERSITY

Revised Edition



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To My Wife

Preface

It gives me a feeling of deep gratitude to have been able to prepare this thoroughly revised edition of the *Concise History of the Law of Nations*. Approaching the subject rather late, I was soon to become fascinated by it. After teaching it for a number of years, I decided to write a textbook on it. This venture resulted in what I believe to be a not infrequent experience. The printed form allows the author to take distance from his work and to benefit from criticism. Such re-examination was especially desirable in the case of this undertaking, which in many respects amounted to the breaking of new ground. Extensive alterations of the first edition appeared to be necessary. In the present edition more space has been given to those developments in Russia and, generally, in the East that are comparable to, or in contrast with, the Western law of nations. The discussion on the Middle Ages has been considerably expanded; most sections of it have been entirely rewritten. In the treatment of modern times the former division according to centuries has been replaced by an organization based on such landmarks as the Peace of Westphalia, the Congress of Vienna, and the Peace of Versailles. The question as to whether the Spaniards of the sixteenth century or Grotius really initiated international law—a question that has recently come more and more into the foreground—has been accorded closer scrutiny. A new appendix is devoted to an inquiry into the pertinent publications of James Brown Scott.

In other respects, too, the discussion has been amplified, especially with reference to matters of state practice. A better balance between theory and reality has thus, I hope, been reached. The basic objective—namely, to bring into relief the bold lines and the representative figures of the law of nations—has remained the same. I have therefore refrained, as I did previously, from burdening the text with names and other data of secondary significance. Many more such data, however, have been added to the footnotes.

The bibliographical references have been broadened, particularly by further research into the literature of Latin countries. It is confi-

dently hoped that this volume will be helpful also to those who seek more than general information on the subject.

Once more my sincere thanks go to the Columbia Council for Research in the Social Sciences, which for years has demonstrated encouraging and helpful understanding of my work and has again aided me in the research underlying this volume.

ARTHUR NUSSBAUM

New York, September 1953

From the Introduction to the First Edition

. . . The history of the law of nations is little explored and almost uncharted. A distinct concept of the law of nations as a law prevailing among independent states has emerged from earlier vague notions only during the last few centuries. Besides, conditions of antiquity and of the Middle Ages and even of the sixteenth century make it difficult or impossible to apply to them such tests as "independent state" or "law" if the latter term is understood, as it must be today, in a juristic sense. Interrelations of the most diverse human groups bearing some resemblance to states and, on the other hand, norms of a purely religious character will have to be considered in any extensive historical inquiry. The term "law of nations," translated from the ancient Latin *jus gentium*, is broad enough to cover the various historic patterns. It is therefore employed in the title of the present volume, though the phrase "international law," which is now synonymous with "law of nations," has become more current. . . .

. . . Until the nineteenth century the law of nations remained more a matter of doctrine than of state practice. The Peace of Vienna (1815) made a long stride forward, but the modern law of nations as we know it today began to unfold only in the second half of the nineteenth century. Since then, the rise of the law of nations presents a most impressive spectacle. Even though in this period—and indeed throughout the century—the science of international law lost relatively in historical significance, state practice in matters of international law expanded, intensified, and accelerated to such an extent that the period clearly marks the beginning of a new era. . . .

In the appraisal of the new era some reservations seem appropriate. While, fortunately, tremendous progress has been its dominant trait, there is an unusual amount of futility and mere "show" in international legal activities. Multilateral treaties, for instance, are probably the foremost vehicles of advance in the field; but very many of them are ineffectual because of the paucity or insignificance of their signatories or for other reasons. There may be some justification for the fact that the test of real potency is given little weight in analytical

and textbook treatment of international conventions, though it is puzzling how lightly the question of the number and the weight of ratifications is frequently taken in discussions of treaties. The historian certainly cannot be content with the fact that the legal existence of a certain treaty is attested to by some documents of ratification. Moreover, in the appraisal of the present era he has to be on guard against the deflecting influence of ideologies and hope. There will be few, for instance, who do not respect and admire the spirit and resolve of those men who founded the League of Nations. Still, it would be bad history to veil, under the impact of these sentiments, the fact that the League has completely failed in its major goals. . . .

A vexing problem of method springs from the bearing of political history upon the law of nations. Obviously, almost any phase of political history can be related to international law in one way or another. How to chart the boundary line? This line, it is believed, has been too far pushed into the province of political history. Our inquiry into this field will deal only with international state practices as are indicative of the adoption or rejection of legal rules; it will deal especially with peace treaties and other conventions in which significant legal conceptions were enunciated. As far as the history of doctrines is concerned, attention has been paid, not only to the teachings and lives of the great thinkers on international law but also to their fame or oblivion as important factors of historical evaluation. Our inquiry ends—though not rigidly—with the outbreak of World War II. The later events are too near and too overwhelming to allow a historical appraisal at this time. . . .



Contents

CHAPTER I *Antiquity*

Primitives; Ancient Orient	1
Ancient Greece	5
Ancient Rome	10

CHAPTER II *The Middle Ages—West*

Barriers to International Law	17
Ecclesiastical Law	17
Imperial Law	21
Feudal Law	22
Seeds of International Law	23
Mercantile and Maritime Law	27
Theological Doctrines	35
Legal Doctrines; Projects for Perpetual Peace	39

CHAPTER III *The Middle Ages—East*

The Eastern Roman Empire	45
Russia	49
Islam	51
Meeting of West and East; Consuls	54

CHAPTER IV *Modern Times, Until the Thirty Years' War*

Basic Factors, West and East	61
State Practice	66
Doctrinal Developments	71
Francisco Vitoria	79
Francisco Suárez	84
Military Writers: Pierino Belli and Balthasar Ayala	91

Alberico Gentili	94
Hugo Grotius: Life	102
Hugo Grotius: Works	107

CHAPTER V *From the Peace of Westphalia to the Napoleonic Wars*

The Peace of Westphalia and Its Sequels; Peace of Utrecht	115
The French Revolution; The Napoleonic Wars	118
The Ottoman Empire	121
Countries Outside Europe	123
State Practice: (a) Peace	124
State Practice: (b) War	129
Doctrinal Developments	135
Deniers of International Law	144
The Naturalists	147
The Naturalists (continued)	156
The Early Positivists	164
The Later Positivists	175

CHAPTER VI *From the Congress of Vienna to World War I*

Main Political Agreements and Declarations	186
Growth of Written Law: The New Era	196
Treaties on Commercial and Related Matters	203
Treaties on Private International Law and Judicial Assistance	212
International Disputes	215
Humanization of Warfare	224
World War I	230
Doctrine of International Law: Positivist Trends	232
Speculative Trends; Private International Law	236
Systematic Treatises; Organization of Learning	243

CHAPTER VII	<i>From the Treaty of Versailles to World War II</i>	
	The Peace Treaties and Their Sequels	251
	International-Law Developments Not Connected with the Peace Treaties	261
	International Disputes and Judicial Organizations	268
	Doctrinal Developments; Organization of Learning	276
	Soviet Practice and Doctrine	285
APPENDIX I	<i>Survey of the Historiography of International Law</i>	291
APPENDIX II	<i>James Brown Scott on the Superiority of the Spanish Scholastics over Hugo Grotius</i>	296
NOTES		307
INDEX		363



A CONCISE HISTORY OF THE LAW
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CHAPTER I

Antiquity

PRIMITIVES; ANCIENT ORIENT

In a much cited passage of his *Esprit des lois*, Montesquieu asserts that all nations, including the Iroquois, who ate their prisoners, have a law of nations. This somewhat disquieting statement is not borne out by modern ethnology. The picture which emerges from reports of ethnologists¹ is scant and motley. Not even the distinction between war and peace is always known to primitive tribes. Some have not yet developed the notion of collective and organized fighting such as is characteristic of warfare, while others are living in a permanent state of open or latent hostility toward their neighboring tribes. The idea that the foreigner as such is an enemy has left traces in early civilized thought; among the primitives he is sometimes not even considered a human being. Among the determinant factors are the density of population and other natural conditions, as well as racial traits and the respective state of pre-civilizational development. It is true that among the primitives such practices are found as the sending and receiving of envoys—a point stressed by Montesquieu with an eye to the Iroquois—or the sparing of the weak and helpless in warfare, but they are sporadic and of dubious interpretation. Quasi-Rousseauian explanations and generalizations of primitive behavior in terms of a modern law of nations should be viewed with distrust. At any rate it is unwarranted to assume with Montesquieu that there is something in mankind like an innate idea of international law.

Still, phenomena of that law have been conspicuous since the dawn of documentary history, that is, from the fourth millennium B.C. Approximately in 3100 B.C. a treaty was concluded between Eannatum, the victorious ruler of the Mesopotamian city-state of Lagash, and the men of Umma, another Mesopotamian city-state.² The treaty is expressed in the Sumerian language and has been preserved in an in-

scription on a stone monument (stele) which was discovered in the first decade of this century. The denomination of "state" is presumptuous for the two communities; but they had been at war, and the treaty pronounces the inviolability of the boundary ditch and border stone, which is acknowledged by the vanquished men of Umma under an oath by six or seven of the most powerful Sumerian gods. Hence, the gods, who in this particular case were common to both parties, became the guarantors of the treaty: they would punish its violator. Ordinarily, in the early period, both parties would take the oath on the observation of the treaty; where the local gods were different, each party invoked his own gods. Swearing by one party only, as happened in the Lagash-Umma situation, seems to indicate a status of vassalage on his side. Writers have asserted that the Lagash-Umma treaty contained a clause of arbitration, which would make arbitration one of the most venerable institutions of mankind; but all we know is that the border stone between Lagash and Umma was set by Mesilim, king of the neighboring community of Kish, who, however, was probably a kind of overlord to the princes of Lagash and Umma.

In the present state of our knowledge, the Lagash-Umma treaty is separated by a period of more than a millennium from the next following treaty of which documentary evidence is extant. From the second millennium B.C., texts of a goodly number of treaties have been preserved on clay tablets or on monuments.³ To most of them Egyptian or Hittite rulers were parties (the kingdom of the Hittites flourished in Asia Minor from the eighteenth to the twelfth century B.C.). Babylon and Assur are likewise in the fore. In addition to peace, the treaties are concerned with alliances and boundary lines.⁴

By far the most important among the preserved treaties of the second millennium B.C. is the peace and alliance concluded in 1279⁵ between Rameses II of Egypt and Hattusili II of the Hittites. The language of the original is Akkadian (Babylonian), which is said by Orientalists to have been the "diplomatic" language among the oriental monarchies of the era. The co-contracting rulers pledged reciprocal aid also against internal foes, who were to be extradited when taking refuge with the ruler of the other country. Here we have a pristine example of the earlier, political type of extradition. An unusual, in fact surprising, feature of the treaty of 1279, consists in the provision that the extradited person should not be liable to punishment. The new "brotherhood," as it was called, of the two rulers, was ex-

tended by the treaty to their sons and their countries, transcending the personal character which was to prevail for millennia in international conventions. The religious sanctions were more elaborate. A thousand of the Hittite gods and a thousand of the Egyptian were invoked, a number of them specifically by name.

From later Egyptian history it may be mentioned that King Amasis (569–527 B.C.) granted Greek cities in the delta of the Nile a self-governing settlement called *Naucratis*, where their citizens were allowed to live under Greek religion and law.⁶ In this action one might find an early antecedent of the medieval colonies of European settlers in Egypt and other parts of the Near East.

Ancient Jewry also appears in the dawn of international law.⁷ Treaties were surrounded by oaths and religious symbols, such as the holy number seven and the sacrificing of animals. Deuteronomy contains what are probably the oldest written canons on warfare prohibiting the killing of women and children, among others. Of course, these canons were not meant as anything like international law; they were addressed to the Jewish people, and they were stern enough. Furthermore, there is in Deuteronomy an indication of the notion of holy war, which came to be resumed by Islam and, in the Crusades, by Christianity. The duty to uphold sworn promises made to the enemy, even under trying circumstances, is firmly asserted (Isaiah 8:9)—a remarkable evidence of religious morality. To the history of international relations, rather than to the law, one must assign Isaiah's lapidary prophecy (2:4) that after the advent of the Messiah "they shall beat their swords into plowshares, and their spears into pruning-hooks: nation shall not lift up sword against nation, neither shall they learn war any more." Through the mediation of Christendom, this announcement has become a main root of modern pacifism, which in turn, as will be seen, has influenced the development of international law.

In recent times a few studies have been published on the so-called international law of ancient India and China.⁸ They describe historical events and practices, but they reveal little that could, even in the broader sense of the word, be considered as international law. As has long been known, the Hindu Code of Manu—compiled about 100 B.C. from older material—displays an astounding degree of humaneness, if not softness, in matters of warfare. An honorable warrior is supposed, for instance, not to strike an enemy who is sleeping, or has lost

his coat of arms, or is naked, or is overcome with grief, or has turned to flight. These, and many similar prescriptions, seem to relate to inter-Indian feuds; even so, it is difficult to believe that they had any major significance in actual combat, especially as they were not fortified by legal sanctions. Yet they characterize Indian spirituality, and there is historical evidence of an Indian custom to spare, in warfare, plantations and habitations as well as the cultivators of the soil. This, too, was in accord with the commands of Manu.

Again, the interrelations of Chinese rulers of the first millennium B.C. can hardly be called "international." The presence of a theoretically superior imperial power, weak though that power was at times, obviated their characterization as international just as it did later in the medieval European situation. Among the various quasi-international mores of ancient China this one stands out: the people of belligerent rulers definitely did not consider each other as enemies, and there was no discrimination against subjects of an enemy prince. In peacetime, intercourse between the rulers and their envoys was observed in elaborately gradated ceremonies, depending on the rank of the persons concerned. There was much reflection on war and related subjects. The Grand Union of Chinese States planned by Confucius (551-479 B.C.) has been compared to the conception of the League of Nations.

Treaties, invariably surrounded by religious symbols, mark the earliest period of documentary Oriental history; in fact, as was pointed out, documentary history begins with a treaty. It cannot be doubted that there had been treaties, especially peace treaties, before. In this respect, the observations of ethnologists are significant, inasmuch as peace treaties are, or were, practiced by illiterate (which does not necessarily mean primitive) tribes. Here again the treaties appear associated with religious sanctions and ceremonies.

Noted writers have asserted that in international relations binding customs have preceded treaties. This is no more than a hypothesis. The writers apparently have in mind the inviolability of envoys, but the validity of the inviolability rule in early civilization is dubious. The ancient Egyptians, it seems, considered an envoy as a kind of hostage⁹—a conception reappearing in much later history.¹⁰ Even in ancient India, we are told, the inviolability of envoys was not definitely recog-

nized except for the sparing of their lives; ¹¹ in ancient Greece it existed only under special conditions.¹²

Warfare in the ancient Orient was aimed, just as with the primitives, at extirpating the enemy with no distinction of age or sex, and with unlimited relish in cruelty. We observe the beginnings of a religio-moral reaction among the Hindus and the Israelites; but similar restraints were absent in other nations, especially among the Assyrians who, despite their high civilization, excelled in cruelty. However, one must keep in mind that moderation in warfare, even during the Middle Ages and beyond, remained to all intents and purposes a matter of racial disposition, political wisdom, military discipline, and personal generosity.

ANCIENT GREECE

During the first millennium B.C. the Greeks entered the realm of history and soon evolved that amazingly high and many-sided culture which became an inexhaustible source of inspiration for later generations. In the international sphere,¹³ however, the Greek outlook was limited. During the era of Greek independence a few treaties between Greek and non-Greek communities were concluded; but on the whole the Greeks considered the "barbarians," that is, the non-Greeks, as born enemies designated by nature to serve the Greeks as slaves. Aristotle, in a famous passage of *Politics*, likens to a hunt the war against those who, though destined to be governed, will not submit; such a war he considers as "just by nature." We notice here a residue of notions belonging to the pre-civilizational stage. However, the Athenian would not look at the Spartan as at a foreigner, even though the latter was actually his enemy. Despite political segregation and discord, the Greeks felt strongly that they belonged to the same racial, cultural, lingual, and religious community. From the very conflict between this sentiment and the actual political situation there evolved an elaborate system of religiolegal ties among the Greek city-states, which in a way counteracted and mitigated the harsh effects of separation and antagonism.

Perhaps the most distinct expression of political cohesion in the Hellenic world consisted in the multitude and variety of inter-Greek

treaties. Such an elaborate treaty system did not appear in the international sphere until the nineteenth century. Familiar political compacts like peace treaties, alliances, and confederations form the bulk of the preserved Greek material; remarkably enough, up to the fourth century B.C. peace treaties were ordinarily concluded only for a definite period, reminiscent of earlier times in which war was the common condition. Other agreements, frequently embodied in political conventions, granted personal liberty and protection of property—including the right of acquiring real estate—to the citizens of the co-contracting state, in a manner comparable to modern treaties of commerce. Among treaty allowances of a now unfamiliar type, were rights of intermarriage and of attending public games. Confederate citizens frequently received more or less equality with nationals. These compacts (called “isopolities”) varied greatly. Other agreements, again in connection with political arrangements, provided for importation and exportation and for a unified standard of coinage,¹⁴ while agreements on navigation seem to have been lacking.

Even in the absence of a treaty, one Greek state often granted equal rights, or at least special protection, to the citizens of another—a further evidence of the feeling of kinship.

One group of legally recognized aliens, the *metoikoi*, was different in that it included a number of non-Greeks. The *metoikoi* were permanent residents, officially registered as such. They enjoyed full juridical protection, but no political rights and no right to acquire real estate; and they were subject to conscription for lower military services. The *metoikoi* played an important role in trade and commerce; they were particularly numerous in Athens, constituting, it has been estimated, a tenth or an eighth of the population,—which at its climax amounted to half a million.

Relation to international law is closer in the case of the *proxenoi*. The *proxenos* was a prominent citizen to whom a foreign state officially entrusted the protection of its citizens and various diplomatic functions within his own state. Though the institution of *proxenoi* easily lent itself to divided loyalty, it played an important role in Greek history. The *proxenos* has frequently been likened to the modern consul, especially to the “consul-elected” who in modern times is chosen among the residents and even the nationals of the country of his mission. Yet the *proxenos* was a political rather than commercial agent, and he was not officially admitted to his office in

his own state (there was no "exequatur"). Moreover, the powers and functions of the *proxenoi* varied greatly according to circumstances.

Religious elements were an important factor in the legal relations of the Greek communities. Oaths of course were reciprocally taken in the making of compacts. A specifically Greek phenomenon of a lego-religious character was the amphictyony. An amphictyony was an association bound by a covenant to protect a common sanctuary. The sacred bond established among its members was frequently extended beyond the prime objective of the covenant so as to make them political confederates. This was particularly true of the amphictyony which was dedicated to the protection of the temple of Delphi, the holiest sanctuary of the Greeks. The religious motive also emerges in inter-Greek customs. Thus, throughout Greece, the right of asylum was recognized (though not always respected) with regard to the persecuted who were taking refuge in certain temples.

A remarkable trait of the ancient Greek scene was arbitration, which occurred in disputes on frontiers, on rights in streams and springs, and in other issues of public law.¹⁵ There were even a few, highly imperfect agreements to arbitrate disputes which might arise between the parties—a device which has become important only in very recent times. The arbitrators had to take an oath—sometimes in a sanctuary—to act impartially; one of the preserved formulas contains a self-imprecation of the arbitrator and his whole race in the case of a violation of his duties. Ordinarily a third state rather than a single person was made arbitrator, a practice suggesting a political conception of arbitration. The third state would delegate its arbitral power to a committee of three or more citizens or to a large group—who were probably chosen by lot, and in one case totaled no less than six hundred—thereby further strengthening the political factor. It is also strange, from a modern point of view, that it was apparently held proper for arbitrators to receive gifts and honors from the winning party. Arbitration is perhaps the brightest aspect of Greek "international" law; but writers have exaggerated the significance of Greek arbitration, apparently in a desire to hold out a venerable example to a deficient present. Not only was it virtually limited to inter-Greek feuds, but prior to the battle of Chaeronea (338 B.C.), by which Philip of Macedonia destroyed Greek independence, there were scarcely half a dozen authentic instances of arbitration scattered over two centuries.

Most of the alleged instances belong to later periods. Under Macedonian domination, the arbitrator named was often the Macedonian king, and under Roman domination, the Roman senate—in each case with the power of delegation. During this period arbitration did not actually serve as a means of averting war among Greek states, which in fact had become politically impotent; arbitration was now a kind of administrative machinery in the hands of the Macedonian or Roman ruler—a form of statecraft concealing the use of what amounted to coercive authority. It is true that within the various federations (leagues) which emerged in the Hellenistic era after the death of Alexander the Great (323 B.C.), arbitration was often resorted to in disputes between the diminutive member states of the federations; but this arbitration also seems to have had a more or less compulsory character under the control of the respective federal authorities, and can hardly be likened to arbitration between modern independent states.

Peaceful relations among the Greek communities were much disturbed by the practice of reprisals.¹⁶ Today, we use the term “reprisals” for blockades and other coercive measures taken by one government against another for the enforcement of an asserted international right. However, they originated in an ancient custom which permitted an individual to use force for the protection of rights not only against an alleged foreign wrongdoer but against his country and fellow citizens as well. Though the practice suggests a crude legal notion of joint responsibility of a community for actions of its members (an idea always alive in the political field), private reprisals are preeminently symptomatic of lawlessness and barbarism. This is very true of ancient Greece, especially in the first centuries of her documentary history, when people enjoyed little or no protection outside their city’s boundaries. Reprisals were allowed not only against the property, but sometimes against the person, of a foreigner who could be seized and abducted. There was even a special word for that practice, *androlepsia*. Sometimes reprisals were prohibited by treaty. There are also isolated examples, of litigation with foreigners, in which foreign judges were allowed to participate in the procedure—a measure consonant with the idea of arbitration, and dimly suggesting something like international tribunals.¹⁷

On the capture of foreign ships in war or peace the Greeks had

rather loose ideas. In fact, the feat of pirates was often glorified. The conception of piracy as something criminal in itself was unfamiliar to them, as it was generally to the ancient world.¹⁸

Regarding the Greek attitude toward warfare in general, nothing is more significant than certain remarks ascribed to Socrates by Plato. According to Plato, he proposed to limit the concept of war to fights with the barbarians; fights among Greeks, he said, were not wars, they were "disease and discord." Hence he suggested that wars among Greeks, if they could not be avoided, ought to be waged with moderation. As a matter of fact, there are many reports on acts of restraint and clemency in inter-Greek armed contests. But it is difficult to discover lawlike rules of warfare. One might mention, perhaps, that the protection granted to sanctuaries by amphictyonic treaties was particularly intended for wartime. Some religious practices, it seems, were very generally followed in war: the asylum of temples was extended to fugitives from battle; priests were usually held inviolable; and each belligerent party was to be permitted by the enemy to bury its dead. A memorable and noble custom forbade the erecting of stone or bronze trophies on a battlefield; only wooden trophies were allowed—there should be no perpetual symbol of enmity.¹⁹ Still, there was in Greece nothing like the Code of Manu or Indian meekness.

In retrospect it appears that the rules observed in the relations among the ancient Greek states were largely religious and, despite the independence of the states, in reality rather intermunicipal. In no way were they related to a broad conception of a family of nations. They were simply the expression of racial and cultural unity, hence of a national sentiment which asserted itself over political division. There are some interesting and occasionally fascinating similarities with phenomena of modern international law, but they are accidental. The Greek practices failed to open avenues of progressive development. The great and manifold aptitudes of the ancient Greeks did not include a particular talent for legal thought. However, Roman ideas on subjects related to international law were influenced by Greek philosophy, and it is in this indirect way that Greek thought has become an effective ferment in the evolution of the law of nations.

ANCIENT ROME

In contrast to ancient Greece, the law was paramount among the cultural achievements of ancient Rome. Roman private law, as compiled and handed down to posterity by the *Corpus juris civilis* of the Byzantine emperor Justinian (A.D. 527–565), has earned eternal glory. What one might call the international law of the Romans is of minor significance—another diversity from the Greek situation. Nevertheless, the unique strength and greatness of the Roman legal genius is perceptible in the international sphere also.²⁰

With the Romans still more than with the Greeks the background of treaties and war was religious. As early as the era of the kings, which ended in 509 B.C., a special group of priests, the *fetiales*, organized in the *collegium fetialium*, was entrusted with the administration of the religious ceremonies pertaining to treaties and to war and other international matters (legation, extradition).²¹ The rites accompanying the conclusion of treaties did not essentially differ from those found elsewhere in antiquity; they included invocation of the gods, sacrifices, and self-imprecation. The functions of the *fetiales* in respect to the beginning of a war were more remarkable. It was for them to decide whether a foreign nation had violated its duties toward the Romans. The elaborate proceeding did not provide for the active cooperation of the foreign nation, but whenever the latter was deemed guilty of a violation of its duties, the delegate of the *fetiales*, under oath by the Roman gods as to the justice of his assertion, would demand satisfaction of the foreign nation. The oath culminated in self-execration condemning the whole Roman people should the delegate's assertion be wrong. In case the foreign nation wanted time for deliberation, thirty or thirty-three days would be granted. In the days of the Republic, if the period terminated without result, the *fetiales* would certify to the senate the existence of a just cause of war; the ultimate political decision was left with the senate and the people. The war, if declared, would then be "just" as well as "pious"—*belum justum et pium*. The proceeding gave assurance to the Romans that in the contest the gods would side with them; it thereby strengthened the morale of the people. Theoretically, the *jus fetiale* was Roman municipal law, a part of the unwritten law of the Roman constitution; but, in the

hypothesis of an offense committed against the Romans by the foreign nation, it contained a crude international notion. During and following the later republican era, the *jus fetiale* faded, especially in its application to war; but the conception of just war survived and assumed a new and formidable significance in later periods: in fact, the invention of the "just war" doctrine constitutes the foremost Roman contribution to the history of international law.

The comparatively infrequent treaties of the Romans were for the most part concluded under the Republic, and they are on the whole not good examples of international law. Most of them reflect in terse technical phraseology the Roman methods of political expansion. In addition to the familiar forms of vassalage treaties, the Romans developed a highly characteristic type of treaty of surrender (*deditio*). Following the model of "stipulations"—formal transactions developed in the Roman law of private contracts—the representative of the Romans, in concise, traditional language, would put certain preliminary questions (on power of attorney and liberty of disposal) to the representatives of the vanquished nation, and upon a satisfactory answer would ask them whether their nation was willing to surrender to the Romans the persons and property, sacred and profane, of their nationals. In the case of an affirmative reply, the Roman representative in the name of the Roman people would declare his acceptance of the *deditio*. The surrendering party thereby gained a fair chance for, though not a claim to, indulgent treatment. Another characteristic type of Roman treaty is presented by the "unequal alliances" (*foedera iniqua*), by which the allied country recognized the superior *majestas* of Rome and possibly submitted to formal restrictions of its right to wage a war of its own. Such alliances are akin to compacts of vassalage. Among the other treaties of the Roman Republic those concluded with Carthage in 509, 306, and 279 B.C. are outstanding. They may roughly be characterized as establishing reciprocal spheres of interest, with heavy maritime restrictions laid upon the Romans, whose ships were excluded from important—primarily African—coastal waters. It was a most unusual type of convention.

Imperial Rome had no great need of international conventions. Emperors of the second and third centuries of the Christian Era entered into commercial agreements with neighboring nations which opened the frontiers at definite places and times for the purpose of

trade. The first and most important agreement of this type was made in A.D. 175, between Marcus Aurelius and the German tribe of the Marcomanni.²²

The differentiation between an international agreement and its ratification was known to the Romans and led to an extreme consequence: the Roman negotiator who, under oath, had entered into an agreement to which the senate denied ratification was extradited to the other party, a rule probably motivated by a desire to placate the gods invoked by the negotiator.

Apart from treaties, not much can be said of Roman state practice in matters of international law. Inviolability of envoys was recognized. And though strangers were generally considered to be outside the pale of the law²³ the Romans actually did not extensively discriminate against barbarians or against others racially foreign: one may say that, in contradistinction to the Greeks, the Romans did not live in a state of latent hostility with the rest of the world. This disposition also influenced their wars. While legal or religious restrictions of warfare did not exist, and excesses of cruelty occurred from time to time, discipline and prudent moderation prevailed. The Romans were bent more upon adding foreign nations to the empire than upon exterminating them.

The main significance of Roman law for the development of international law is indirect, however.²⁴ When in the sixteenth and seventeenth centuries the first inquiries into the legal aspects of international relations emerged, it was quite natural that writers and diplomats found in Roman law a pertinent frame of reference. Roman law was at that time the common law of the Holy Roman Empire, and it enjoyed high authority everywhere in the West. England, as will be seen, was first instrumental in propelling Roman law into the international sphere.²⁵ Unfortunately, the Roman sources were primarily concerned with private law; on international law they said virtually nothing. Hence writers would quite indiscriminately apply terms of Roman private law to seemingly analogous international situations. Rules on private ownership (*dominium*) were applied to territorial sovereignty; rules on private contracts, to treaties; rules on *mandatum*, to the functions of diplomatic agents, etc. It was only in the eighteenth, and more particularly in the nineteenth, century that the hold of ancient Roman law on the theory of international law was definitely broken.

Vestiges of doctrinal affiliation with Roman law are widely apparent in the terminology of modern international law.²⁶ Thus the term "state servitude" stems from the Roman *servitus*, which indicates rights of passage and other "easements" attached to a parcel of land; the term "prescription" and its types (extinctive, acquisitive, immemorial) are taken from Roman sources; the word "occupation," as applied to the seizure of a territory not yet under a sovereign, is derived from the Roman *occupatio*, which means appropriation of a thing movable or immovable which belongs to no one; terms like "alluvion" and "accretion" are likewise Roman. It is more difficult to specify definite Roman norms incorporated in modern international law. Possible examples would be the rule that in the occupation of newly discovered lands, title of sovereignty is acquired only by the taking of possession; or the basic idea of extinctive prescription according to which a claim is definitely barred by lapse of time.

Probably the most conspicuous evidence of the historic affiliation of Roman and international law is the familiar name "law of nations" (*droit des gens*, *Völkerrecht*), which is a literal translation of the Roman *gens gentium*. This relation requires a somewhat closer inquiry.²⁷

The ancestral Roman law, exclusively applicable to Roman citizens, was an extremely rigid, harsh, and narrow law sprung from the needs of a primitive rural community. It was characterized by the requirement of utterly cumbersome formalities for the few typical transactions which it recognized. Non-Romans remained theoretically outside the boundary of the law. This crude and archaic system, the *jus civile*, could not persist once Rome began to grow into a large emporium and to attract numerous foreigners. Their status was officially recognized in 242 B.C. when a special magistrate (*praetor peregrinus*) was instituted to take care, by appointed judges, of litigation between foreigners or between a foreigner and a citizen. Through this procedure, new and liberal rules evolved, amalgamating valuable elements of Roman as well as foreign law, and imbued with the principles of fairness and equity. The archaic formalities of the *jus civile* were to a great extent discarded; for instance, sales and contracts for sale were recognized if made orally, or even through conclusive conduct tacitly, whereas the *jus civile* required for analogous transactions the presence of five witnesses and the observance of elaborate formalities. Gradually the new liberal body of rules was extended to litigation between

Roman citizens and became, as the *jus gentium*—in contradistinction to the *jus civile* of old—the core of what we consider today as the classical Roman law.

The evolution of the *jus gentium* symbolizes Roman liberalism toward foreign culture; but this *jus gentium* had nothing to do with the modern law of nations, which, we know, means the law governing relations among independent states as such. The *jus gentium* is a national Roman law—though sometimes borrowed from foreign sources—and it is virtually “private law,” that is, it is concerned with relationships among individuals.

At times, however, the Roman sources employ the juxtaposition of *jus civile*—*jus gentium* in a somewhat different sense. Particularly the Institutes, the first part of the *Corpus juris*, start with an observation of the famous jurist Gaius (second century of the Christian Era), who contrasts the *jus civile* as a law established by each people (*populus*) for itself, with the *jus gentium* which is the law established among all men (*homines*) by natural reason and observed as it were by all nations (*gentes*). This amounts to a philosophical generalization of Roman conditions. While the historical *jus gentium* of the Romans only here and there utilizes foreign experience, the philosophical *jus gentium* as defined by Gaius is a comprehensive concept which includes rules and legal institutions (allegedly) found everywhere, such as matrimony, protection of property, or the wrongdoer's obligation for damages; it is a universal law. Among its subjects, matters of international character, like the inviolability of envoys or the law on spoils in war, are mentioned in the sources; but this, of course, is not tantamount to equating *jus gentium* and international law. The bulk of the philosophical *jus gentium*, too, consists of private law, augmented by some topics of internal public law, for example, the status of the *deportatus*, who is said to enjoy the *jus gentium* though not special political rights (that is, not rights derived from the *jus civile*).

The distinction between *jus civile* and *jus gentium* was adopted and elaborated by medieval and post-medieval writers with the result that the ambiguity of the concept of *jus gentium* was further increased. On the whole, the meaning of universal law came to prevail. It is only in the seventeenth century that *jus gentium* began to assume the significance of a technical term for the law among independent states. Unfortunately, the translation of this into “law of nations,” or even into “international law” has been applied frequently to earlier refer-

ences to *jus gentium*, though the former translation is misleading and the latter definitely inaccurate. In this volume the term *jus gentium* will remain untranslated except where it was actually employed in the modern sense of the "law of nations."

The problems of terminology and meaning were aggravated by another conception appearing in the Roman sources; viz., the one of natural law or law of nature (*jus naturale, jus naturae*).²⁸ Here Greek tradition enters. The idea of natural law, that is, of universally applicable rules derived from right reason, is owed to Greek, and particularly to Stoic, philosophy of the third century B.C. Stoic philosophy found numerous followers in Rome, among them the jurist Cicero who did much to popularize Greek philosophy in his country. Thus natural law became familiar in Roman jurisprudence. The *Corpus juris* itself contains a number of references to natural law and to natural reason as a source of law, though they hardly amount to more than rationalizing and perhaps here and there to amending the inherited law in terms of natural justice. Being unenforceable in itself, natural law was considered by the Romans to be inferior to the law proper.²⁹ The vagueness of the conception is brought home by the fact that in some utterances, incorporated in the *Corpus juris*, of the great Roman jurist Ulpian (d. A.D. 228) natural law is depicted as extending to animals inasmuch as they have in common with man the habits of mating and of breeding and of educating progeny. This tenet, inspired by mystical conceptions of Pythagorean philosophy, was not generally recognized by the Roman jurists. With Ulpian himself it was of no legal consequence and perhaps no more than an ostentation of philosophical profundity, not uncommon with legal writers; still it offered to the scholastics of later times an occasion for learned disquisitions and refutations.

The bearing of the natural-law doctrine upon the history of international law is twofold. For one thing, in Roman sources natural law is frequently identified with the philosophical *jus gentium*—the universality of a given rule was quite understandably taken as an indication of its naturalness, that is, of its origin from right reason. For instance, inviolability of envoys derived by the sources from *jus gentium* may just as well serve as an example of natural law. Gaius' definition of *jus gentium*, with its reference to "natural reason," clearly points to the law of nature. On the other hand, the Roman sources

at times contrast *jus gentium* and *jus naturale*; slavery, because found everywhere, is declared to be an institution of the *jus gentium*, but is held not to belong to the *jus naturale*, since by nature all men are free. Thus the doctrine of natural law has evoked a bewildering controversy about the character of the *jus gentium*.

The other bearing of natural law upon international law is more direct. The extreme vagueness, the venerability, and an assumed sanctity of natural law made that notion in later times a kind of magic wand for learned dialecticians to represent new ideas and demands as legitimate offspring of that time-honored conception. International law is an outstanding example of this procedure.

CHAPTER II

The Middle Ages—West

BARRIERS TO INTERNATIONAL LAW

Ecclesiastical Law

The medieval climate of the Western world was not favorable to the development of international law.¹ This is obvious with respect to the Dark Ages, which, following the collapse of the Roman Empire, knew little of law at all. The reconstruction of law and, for that matter, of civilization was mainly the work of the Church. In the course of centuries the Church developed a comprehensive legal system, the canon law. This was codified during the late Middle Ages in the several collectanea composing what came to be called the *Corpus juris canonici*. Canon law was not "national" or "international"; it was "supranational" and even universal, exacting obedience all over the Christian world. Although concerned in the first place with matters spiritual, moral, and ecclesiastical, it far intruded, directly and indirectly, upon spheres which have come to be considered as proper provinces of secular power. Particularly, the Church was able to prescribe rules in the sphere of international relations, rules far more coercive than those presented by the international law of our day; in fact, such effective sanctions were available as excommunication and threat of punishment in the world beyond.

Perhaps the greatest contribution to the Church in the secular field was related to the law of war and peace. The feuds, or "private wars," were the scourge of continental Europe during the Middle Ages. On principle, feuds were held lawful under conditions which differed in the various territories. Where medieval writers discuss "war," they envisage also "private" wars. The Church could not help recognizing the legitimacy of these bloody contests; it tried, however, to repress the evil as much as possible. This was done by the proclamation of "Truces of God"²—days during which feuds were prohibited. In 1041 such truces were expanded by assemblies of French prelates

to last from sunset on Wednesday in each week to sunrise on Monday. The rule spread from France to other countries and was made general ecclesiastical law by Church councils, particularly by the Third Lateran Council in 1179. In England the right of feudal lords to wage wars of their own was not recognized, at least after the Norman conquest, and the prohibition was sufficiently enforced by the kings. Hence, "Truces of God" proved to be unnecessary there.

Of course, suppression of feuds is not exactly a matter of international law. Another line of ecclesiastical activity, regulation by the Church of general warfare, is nearer to the proper field of our inquiry, but is of only limited importance. The most significant act of pertinent Church legislation was the interdiction pronounced by the Third Lateran Council against the enslavement of Christian prisoners of war. The Second Lateran Council (1139) forbade the use of crossbow and arch as "deadly and odious to God."³ The rule, which certainly appears curious in the era of the atomic bomb, aimed probably at preserving knightly forms of combat.⁴ The use of poisoned weapons, widespread in the period, was not prohibited.⁵

The habit of confirming treaties and promises by an oath persisted during the Middle Ages. The general lawlessness of the period led even to an increase of solemnities.⁶ The oath had to be "corporeal"; physical action was required, such as placing the hand on the Gospels or on sacred relics, sometimes with strange elaborations.⁷ Up to the twelfth century, taking the oath was tantamount to the very consummation of the treaty. Later, with the spread of the art of writing, the signing or exchange of treaty documents became the decisive act, while the oath came to be accessory only.⁸ In either case the oath, being a "sacrament," subjected the obligation incurred to the jurisdiction of the Church. This meant, on the one hand, an important guaranty, inasmuch as the violator had to fear the punishments ordained for grave sins. On the other hand, Church law developed a refined and perilous doctrine regarding the invalidity of oaths and promises. Not only were various "tacit conditions" admitted, the deficiency of which would invalidate the oath,⁹ but generally oaths and promises running counter to the interests of the Church¹⁰—and this was extended to agreements with heretic and schismatic princes¹¹—were declared null and void. The promisor might even be duty-bound to act contrary to his illicit promise.¹² Moreover, validity of the oath would not make it inviolable. The Church could intervene by way of

dispensation, for which the Pope had supreme and unlimited power, while other Church dignitaries possessed that power either by papal delegation or, to a limited extent, *ex officio*. The frequency of such dispensations finally led to a reaction on the part of the princes. Since the second half of the fourteenth century treaty clauses made their appearance, by which princes obligated themselves under oath (*sic*) never to seek dispensation. Generally there was in the Middle Ages very little honesty in treaty matters.

Exalted ideas of papal paramountcy contributed to further ecclesiastical intrusion in the international field. The Popes remained within the limits of religious authority by conferring upon kings such titles as *Rex Christianissimus* (France), *Rex Catholicus* (Spain), and *Fidei Defensor* (England), though actually these appellations became parts of the royal titles in secular matters. But the Pope would also grant secular honors, such as duke or count, and occasionally even the title of king, which was generally held to be the Emperor's prerogative. Characteristically enough, in 1178 Leo II of Lesser Armenia wanted to receive the royal dignity from both Pope and Emperor.¹³ A remarkable occurrence was the papal grant of that dignity to a Greek Orthodox prince; in 1255 the title of *Rex Russiae* was conferred upon Daniel of Galicia by Pope Alexander IV.¹⁴

Also, the popes claimed on the ground of their divine mission a supreme arbitral power over all Christians. This doctrine found a remarkable application when, in 1298, Edward I of England and Philip the Fair of France submitted a dispute to Pope Boniface VIII "as to a private person and as to Benedictus Gaetanus" (the original name of Boniface VIII). None the less, Boniface imposed his award on the strength of his pontifical authority, observing all the solemn forms prescribed in such a case, whereupon Philip the Fair rejected the award. Not infrequently the Pope would depose kings, and even emperors (Otto IV, Frederick II), and release subjects from their obligations toward the deposed ruler. The climax was reached by a theory which represented the Pope as the lord paramount of the world. It was on this theory that Pope Alexander VI undertook, in 1493, to divide the New World between Spain and Portugal.¹⁵ But there were some medieval precedents for this. In 1155 Pope Hadrian IV conferred upon Henry II of England the power to conquer Ireland.¹⁶ Similarly, in 1455, Pope Nicholas V vested in the King of Portugal power to seize all countries that might be discovered westward of a line

drawn from Cape Badajoz through Guinea. Still the popes relied in these and other cases rather on their right and duty to spread the Gospel to all countries and to overcome the resistance of the enemies of Christianity, though there was also a doctrine which claimed for the Pope spiritual domination over the infidels.¹⁷ In any case the princes obtained through papal support enhancement of the dignity of their enterprise and the cooperation of the Church in colonization, which meant first of all Christianization.

The crusades form a special chapter in the history of ecclesiastic legal activities in the international orbit. While part of the Church's crusade legislation was entirely related to the inter-European scene—such as the expansion of ecclesiastical jurisdiction over the estates of the crusaders¹⁸—international relations were affected by decrees of popes and Church councils prohibiting the sale, to the Saracens, of arms, ships, lumber for ship construction, and other goods useful in warfare; in fact, any trade with the Saracens came to be considered as illicit.¹⁹ Severity of the penalties increased steadily.²⁰ To excommunication were added massive fines and disqualification for public office. The violators were also threatened with the loss of capacity to make a will or to acquire property by succession, and with forfeiture to the Church of all the property involved. Finally, confiscation of the wrongdoer's entire property, and even servitude in the hands of any captor were held out as a menace. On the insistence of the ecclesiastical authorities the prohibitions were, to a great extent, incorporated in enactments of secular rulers. However, this overharsh legislation was on the whole a failure—a fact of perhaps general significance. The desire for the riches of the Orient proved to be stronger than the respect for law and papal commands. Evasion of all kinds, participated in by princes and cities, became rampant. Open offenses, too, occurred on a large scale. When, in 1250, the King of Aragon entered into a commercial agreement with the Caliph of Egypt, Pope Gregory X condemned the agreement in a bull; but this did not stop the Aragon-Egypt trade; in 1272 the King had a consul in Alexandria.²¹ And we shall see that there were many other Christian-Moslem conventions. Finally the popes had to yield. The Curia and authorized ecclesiastics would grant licences for the prohibited trade, and on a large scale absolution for contravention was granted upon payment of an amende of a fourth or a fifth of the gains obtained. The Venetian merchants received a general license from Pope Benedict XII in 1345.²² However,

political alliances with non-Christian rulers were held illicit during the Middle Ages and later.

Violations of anti-Saracen legislation were considered to be "*contra bannum*." Some believe this to be the etymological origin of "contraband," and writers have applied the latter term to the anti-Saracen-legislation. Juridically, such language is not entirely correct. Note that the legislation was addressed not to "neutrals," as are modern rules on contraband, but to persons subject to the jurisdiction of the ecclesiastical or secular lawgiver. Besides, it did not presuppose the existence of an actual state of war, the intention being to withhold from the Saracens the tools for future warfare.

Imperial Law

Besides the Pope, the Emperor represented supreme and universal authority in the Western world. In 800 Pope Leo III, conferring the Imperial Crown upon Charlemagne, restored thereby the Roman Empire in the West and sanctified it in the Christian spirit. The Holy Roman Empire, as it came to be called in later centuries, encompassed roughly central Europe, including Burgundy and the Netherlands, northern Italy, and at times, Denmark, Hungary, and Poland.²³ Legally, this was one grand monarchy; consequently, there could not be "international" relations among its members (princes or free cities). The authority of the Emperor extended in a measure even beyond the Empire's frontiers. The desire of Western humanity for universal power—springing from incessant bloody fights and a desolate state of public administration—enhanced the ideological significance of the Empire. Authority to confer the title of "king" upon other rulers was considered to reside exclusively, or at least principally, with him. For the most part, princes of the Empire or its dependancies were the recipients of royal rank (e.g., Bohemia in 1088).²⁴ And the paramount dignity and diplomatic precedence of the Emperor—the *Romanorum Rex semper Augustus*—was recognized during the Middle Ages throughout the West, though prior to the twelfth century the title *Imperator* was sometimes usurped by minor rulers.²⁵

These are practically the only aspects of imperial power that have a legal bearing upon international relations. One may add that following the example of the Church-inspired Truces of God the emperors contributed to the suppression of feuds through proclamation of

“Peaces of the Land” (*Landfrieden*). This was done first in 1152 by Frederick Barbarossa, and more comprehensively in 1235 by Frederick II. We shall have to mention some measures of the latter monarch on the protection of foreigners and of the shipwrecked; but, even so, the list of pertinent imperial achievements is rather scanty. Certainly it remains far behind ecclesiastical legislation. The disproportion accurately reflects the imbalance of the political situation.

Feudal Law

The evolution of international law in the Middle Ages was not only counteracted by “supranational” law, ecclesiastic and imperial; feudalism, too, worked in that direction.²⁶ Feudalism originated in the early Middle Ages from the need of attaining protection against enemies and lawless elements through local organization of military power. The weaker party, the vassal, entered into a contract with the mightier, the lord, under which the vassal owed the lord military service, fidelity, obedience, and tribute, whereas the lord owed protection to the vassal. The feudal bond extended to the land held by the vassal and to its tenants. These, as well as the tenants of the lord’s manor, became serfs bound to the soil. This system rendered the lord ruler over land and men. Often he acquired judicial power and other prerogatives from secular rulers and from the Church. The result was a “pulverization” of government. On the other hand, a lord might well be the vassal of another lord, because the position of a vassal was considered as an honorable one. Hence, feudal “hierarchies” developed, often under the overlordship of Emperor, King, or Pope.

Feudal ties cut across national frontiers. The King of England was for a time a vassal of the King of France with respect to the Duchy of Normandy; and the Count of Champagne, a French peer and a vassal to the King of France, held fiefs from the Emperor and the Duke of Burgundy. This aspect of feudalism, which might be called its “transnational” effect, appeared most significantly in the overlordships of the Pope.²⁷ Thus the King of Aragon took Sicily and Naples as fiefs from the Pope. These arrangements originated primarily in the desire of the princes to obtain in foreign or domestic matters the support of papal power. The latter aspect is illustrated by the submission in 1213 by John of England to the overlordship of Pope Innocent III and the subsequent papal invalidation of the Magna Carta which had been

forced upon the King by the barons. All these situations were governed by feudal—that is secular—rather than by ecclesiastical law. The vassal prince had to pay homage as well as money tribute to the Pope. Feudal law was of greatest significance to the Church also, because of her vast lands. Under these influences and the general spirit of the period the conception of the Pope as the overlord of Christendom tended to assume a feudal tinge. Broad theories of feudal overlordship were also applied to the Emperor and to the kings; they contributed to the strengthening of monarchy, and thereby to the ultimate extinction of feudalism.

International law has preserved a reminiscence of feudalism in the term “suzerain” which originally referred to the feudal overlord but was later applied to the superior ruler in the case of protectorates and similar relationships of international law.

SEEDS OF INTERNATIONAL LAW

Despite the adverse effects of supranational and feudal laws, some leeway was left to international law. Such law could arise particularly among the countries outside the Empire, including England, France, Castile, Aragon, Portugal, Sweden, and Venice.²⁸ The Empire as such rarely entered international arrangements—a memorable instance being the compact of Joppa (1229) between Emperor Frederick II and the Sultan El Kamil during the Fifth Crusade.²⁹ Princes and municipalities of the Empire concluded conventions primarily among themselves; but, as imperial power steadily declined, they entered agreements also with outside rulers. Conventions of that type were especially made by great Italian communities like Pisa, Genoa, and Milan.³⁰ Old civilization and new wealth transformed these cities (Venice even more so) into centers of culture and progress. Venice and Genoa were also the first to raise the crucial issue of the Freedom of the Seas, by claiming exclusive navigation and fisheries in the Adriatic and the Ligurian Sea, respectively.³¹ In the north of Europe the Hanseatic League’s far-flung political and commercial activities brought developments in international law, though not to the same extent as the enterprises of the Italians.

The types of medieval treaties reflect widely the bellicose spirit of the age. Truces, peace treaties, and alliances were in the fore. Curiously enough, one of these medieval alliances that was strongly phrased—

namely, an Anglo-Portuguese treaty of 1373—was revived as late as 1943, in World War II, when Portugal threw open her airfields to England.³² As a treaty feature not known in our day, one may note the undertaking by signatories of peace treaties or alliances to extradite political adversaries of the co-contracting ruler³³—an arrangement traceable, we know, to early antiquity.³⁴ Feudal notions were another formative element in medieval treaties, especially the notion of the lord's dominion over his territory and its inhabitants. That feature accounts for the many agreements by which the succession to the power of territories was arranged by way of inheritance or marriage, or of downright sale; temporary transfers by way of "pledging" a territory were not unusual. At variance with modern usage, treaties were frequently strengthened not only by oaths but by the pledging of places or forts or jewels or other valuable property, and by the giving of hostages.³⁵ There was a definite rule that, in the case of failure of performance on the part of the debtor, the hostage must not be put to death but might be further detained. Sometimes powerful nobles would act as guarantors (*conservatores*).³⁶ Of course, all these implementations and reenforcements of treaties are only more evidence of the general lack of faith in promises.

Arbitration agreements occurred relatively often during the thirteenth, fourteenth, and the first half of the fifteenth century between minor as well as major rulers, not only on matters of private law, but on questions which we would consider today as pertaining to international law—for instance, on frontiers.³⁷ The property-right conception of feudal power was favorable to arbitral settlement, a process conceived in the light of the ancient Roman law on private arbitration. Arbitration was also furthered by the political insignificance of many of the litigant potentates and by disintegration of the medieval judicial system.

Bishops and other prelates, if at the same time territorial rulers, were frequently parties in medieval arbitration. Christian tradition may have been a factor in these attempts at peaceful settlement, but it did not change the essentially secular character of the proceedings. The same was true of the equally frequent function of high ecclesiastics as arbitrators. Only the rare exercise of the Pope's supreme arbitral power was different; it rested on religious dogma and ecclesiastical law.

The advanced state of medieval arbitration is evidenced by agree-

ments to arbitrate future disputes under a permanent arrangement. A remarkable instance is an arbitral compact of 1343 between King Waldemar of Denmark and King Magnus of Sweden; twenty-four bishops and knights—twelve to be appointed by each king—were to be the arbitrators and conciliators.³⁸ Generally, the Middle Ages preferred large arbitral tribunals and an even number of arbitrators, both features indicating a likening of arbitration to conciliation. The latter task was sometimes expressly imposed upon the arbitrators,³⁹ but was generally understood to be the desirable and paramount objective of the proceeding. The frequency of amicable settlements accounts, perhaps, for the fact that not much of arbitral decisions has been preserved. Commissions authorized only for conciliation appeared here and there in Italian practice.⁴⁰ There are also instances of princes serving as mediators.⁴¹

On the whole, however, arbitration and kindred procedures were rare exceptions. Government monopoly of the use of coercive force in the prosecution of rights is essentially a post-medieval development; the Middle Ages were widely dominated by violent action through small social bodies such as cities and through individuals. The devastation wrought by feuds has already been mentioned. Reprisal against foreigners was another legal institution of a most obnoxious kind.⁴² While feuds might be aimed at reprisals, the two institutions were different; and not only so in legal contemplation. England, as has been seen, was not plagued by feuds; but reprisals were common, playing an important part in intermunicipal relations.⁴³

As in ancient Greece, suppression of reprisals was carried out by autonomous legislation and by way of treaties; but these measures were now more refined. Princes and municipalities felt keenly that they might become implicated in dangerous situations through reprisals staged by their subjects. Hence, statutory legislation, especially in Italy, made such reprisals dependent on authorization by the government. That authorization—in English parlance, “letters of reprisals”—would be granted only where statutory prerequisites were met, and only for the recovery of a definite amount. In England, town-to-town reprisals were first restricted by borough charters and, in 1275, prohibited by Parliament. In the international area effective cure could be attained only by treaties, many of which were concluded among Italian governments.⁴⁴ Generally, international agreements and autonomous legislation alike required that, if reprisals were to be

authorized, the complainant must have suffered "denial of justice" ⁴⁵ in the foreign state while prosecuting his claim there. That requirement offered the home state an opportunity of interposition with the other state and of negotiations for avoiding the actual use of reprisals.⁴⁶ By the end of the Middle Ages private reprisals had practically disappeared except that the western European countries continued the issuance of "letters of reprisals" for use on the high seas, a practice intertwined with "privateering."⁴⁷

The legal status of diplomatic envoys did not change much in the Middle Ages. Just as in the past, envoys were appointed *ad hoc*—for instance, to negotiate peace or a definite treaty. Not even then could their safety be taken for granted in the absence of particular agreements or safe conducts.⁴⁸ Characteristically enough, clerics were often chosen as envoys because of the special protection they enjoyed through canon law and the power of the Church. However, a new type of envoy appeared—the permanent ambassador.⁴⁹ This envoy emerged first in the practice of the Italian city-states during the second half of the fifteenth century (according to some writers, even earlier); Venice, with her wide network of foreign relations, played a leading role in this development. For a long time her example was only sporadically followed by other states, and it took centuries for permanent embassies to become a regular device of international intercourse.

Regarding warfare, medieval history is replete with incredible excesses of savagery and revenge committed during and after battle.⁵⁰ Humanitarian rules comparable to those developed in modern international law were practically non-existent.⁵¹ In the crusades the Knights of St. John (Knights Hospitalers) rendered help to the sick and wounded; but generally no thought was given to medical care on the battlefield.⁵² Prisoners and booty were considered as the personal property of the captor, though there were indications of a modern conception which leaves the disposition of prisoners and booty to military authorities.⁵³ Progress was achieved during the later Middle Ages when enslavement of Christian prisoners of war was gradually abandoned. In this respect the resolutions of the Third Lateran Council, mentioned above, were an important factor. Protection, however, was not extended to non-Christian prisoners of war,

and centuries later such prisoners were still found as slaves in Italy and elsewhere.

Chivalry,⁵⁴ whose rules were based on honor rather than on law, somewhat counteracted the barbarism and perfidy of the period;⁵⁵ but it was observed only in combats between knights. Some usages of medieval warfare are probably connected with chivalry; thus the formal declaration of war which was practiced up to the seventeenth century⁵⁶ is presumably related to chivalry rather than to similar practices of antiquity. Prisoners were ransomed mainly when they were princes or knights. Scales developed early, and in the more important cases the right to ransom was often reserved to the king.⁵⁷ Challenges were sometimes made to substitute a duel between rulers or between selected groups of knights for a battle; but they were hardly anything more than ostentation and evasion.⁵⁸

MERCANTILE AND MARITIME LAW

The trend toward internationalism manifested itself during the Middle Ages most conspicuously within the orbits of commercial and maritime law.⁵⁹ The main incentive was, of course, the need for an exchange of goods. A secondary motive was a desire of the territorial rulers to improve their finances by import duties and other exactions from foreign merchants. All this could be attained only where business was made attractive enough to foreigners. First of all, they were to be assured of safety for their persons and their goods. This did not necessarily require the existence of articulate legal rules; in the beginning foreign trade was practiced, it seems, on the basis of mutual interest and toleration. From this primitive condition unwritten customs were bound to evolve. They were found even during the Dark Ages within the backward north of Europe. In a letter written in 796 to Offa, King of Mercia (Saxon England),⁶⁰ the Emperor Charlemagne promised protection to Mercian merchants "according to the ancient custom of commerce," requesting equal protection to merchants coming from his lands to Mercia; in case of injustice to merchants the local rulers and their courts should grant redress. Charlemagne's express demand for reciprocity is noteworthy, but the declaration in itself, though couched in rather vague terms, represents a unilateral grant of franchise, typifying the second stage in the development

of the law of foreign trade. That stage was of primary importance in the Middle Ages. Franchises were awarded to a group of foreign merchants, such as the merchants of Mercia—a much later instance being the Hanseatics—or else to individual merchants; the safe-conducts often carefully drafted for the protection of the merchants and their goods pertain to the latter type.

The third step is the development of a body of general municipal law favorable to foreign merchants. An early instance is offered by the code of the Visigoths ⁶¹ (A.D. 654) which prescribes that foreign merchants may settle differences among themselves through their own magistrates and under their own law. For that early period the instance is isolated. Legislation protecting or privileging foreign merchants (or sometimes, at least according to the language used, foreigners generally) ⁶² belongs rather to the last three centuries of the era. England was leading in this respect. The Magna Carta (1215), Clause XXX, granted to all foreign merchants the right safely to sojourn and trade in England “quit from all evil tolls”; under conditions of reciprocity they should not be disturbed even in case of war. The *Carta Mercatoria* of 1303 considerably expanded favors to foreign merchants. While this ordinance was repealed as early as 1311, provisions favorable to foreign merchants were incorporated in later legislation and franchises, especially for the Hanseatics.⁶³ The strongest evidence of England’s willingness to cooperate with foreign merchants consisted in the emergence of a legal system particularly adapted to their needs, the Law Merchant.⁶⁴ This law was administered by special mercantile courts sitting in the ports and, for certain maritime matters, by the Courts of Admiralty; it was looked upon as a body of rules basically different from the indigenous “common law” as administered by the common-law courts. In contradistinction to the common law, the Law Merchant, in the words of a seventeenth century English writer, was held to be “universal and one and the same for all countries in the world” and “a part of the *jus naturae et gentium*.” ⁶⁵ In reality the Law Merchant was English, framed from the foreign material by the English legal mind and modified by English legislation and the fundamental principles of English law. The analogy to the historic Roman *jus gentium* as contrasted with the *jus civile* is almost perfect, except that in Rome the ancient law came to be practically outmoded by the *jus gentium*, whereas the Law Merchant was finally merged into the common law. The procedure in the mercantile courts was

swift and summary. Foreign merchants had a vote in the election of judges and might be allowed to supply half the jury where a foreigner was a party.

On the Continent kindred legislation and legal institutions were not lacking. In 1220 Emperor Frederick II, by his famous "*Authentica*" (decree) *Omnes peregrini*,⁶⁶ granted all foreigners full freedom to dispose of their property by contract or will, abolishing thereby the right of local rulers to appropriate such property wholly or in part in case of the foreigner's death (*jus albinagii*, *droit d'aubaine*). Unfortunately the decree was widely disobeyed, and it had no effect in France, where the *droit d'aubaine* flourished until late in the eighteenth century. Greater progress was achieved through the elaborate franchises granted by secular and Church authorities to the Fairs in the Champagne, Lyons, and other places where merchants of the whole Christian world flocked together, sojourning usually on ecclesiastic territory.⁶⁷ The franchises for the Fairs included the establishment of mercantile courts applying like the English a summary proceeding.

Furthermore, permanent mercantile courts frequented by foreign parties appeared about the middle of the twelfth century in Italian city-states (Milan, Pisa), and later in other Mediterranean trade centers such as Narbonne and Barcelona.⁶⁸ In the Mediterranean area the judges, originally heads of guilds, were called consuls (*consules mercatorum*). While continental mercantile institutions did not produce a coherent body of law such as the Law Merchant, they contributed in some respects to the development of a uniform (non-national) mercantile law—the Fairs contributed through their regulations and customs to the law of currency and negotiable instruments, while the jurisprudence of the seaports developed the maritime law. On the latter topic more must be said.

Maritime law—the paramount part of commercial law prior to the spread of railroads and highways in the nineteenth century—is particularly suited to cosmopolitan interchange and adaptation. Obviously, in seafaring and in maritime trade a certain homogeneity of legal rules will be established in wider areas on the strength of uniform needs, habits, techniques, and traditions. Custom is the principal basis of uniformity in this field, but in the course of time, here as elsewhere, customs were fixed and clarified by the activities of courts, legislators, and compilers. Thus, in the twelfth century the *Rolls*

of *Oléron*, a compilation of rulings laid down by the merchant court of the small island of Oléron in the Bay of Biscay, found recognition in the littorals of the Atlantic and the Baltic.⁶⁹ It contained borrowings from the so-called Rhodian Sea Law, a Byzantine maritime law book probably written between A.D. 600 and 800.⁷⁰ The *Rolls of Oléron* were received in England and during the fifteenth century incorporated into the Black Book of the Admiralty, whose courts, beginning with the sixteenth century, gradually absorbed the functions of the local mercantile courts.

An even more important collection of maritime rules was the *Consolato del mare*.⁷¹ Compiled probably about the middle of the fourteenth century in Barcelona, and likewise influenced by the Rhodian Sea Law, it became the recognized maritime law of the littorals of the Mediterranean and won authority far beyond this area.

Like the *Rolls of Oléron* and other maritime lawbooks of the period, the *Consolato del mare* was primarily concerned with matters of private law; it dealt, for instance, with the rights and duties attending the construction or sale of a ship, with rights and duties of the master, the mariners and the passengers, and with documents relative to affreightment. However, the *Consolato* also treated at some length a vital aspect of maritime warfare—prize law; and this part of the *Consolato* particularly has preserved its fame. The *Consolato* aimed at the protection of neutral property: neutral goods on enemy ships and neutral ships carrying enemy goods should not be subject to capture by a belligerent. The respect for neutral rights was carried so far that the neutral shipowner must be reimbursed for the freight charges on enemy cargoes, and the neutral owner of cargo was held entitled to redeem the enemy ship at a reasonable price. The belligerent, on the other hand, was accorded the right of inspecting the ship's papers, a provision foreshadowing the belligerent's later right of "visit and search." The basic notion of the *Consolato*—protection of neutral property—became dominant in the maritime wars of the Middle Ages and remained influential during modern times; in the eighteenth century it was recognized as the common law of nations.⁷²

However, conditions in the field remained widely chaotic. Although piracy was rampant there was still little awareness of the necessity to fight it with the weapon of the law.⁷³ The Third Lateran Council

(1179) condemned piracy under penalty of excommunication, but, characteristically enough, only if it was committed against Christians. From the fourteenth century on, Italian and other ordinances against piracy made their appearance, yet all too often exceptions were allowed regarding Saracens and other infidels. Moreover, governments that had enacted decrees of this kind did not observe them very strictly; in fact, they themselves tried their hand at pirating where the opportunity was sufficiently attractive. Hence there is little justification for distinguishing in this period forays by warships or by private vessels acting on license, from depredations by unlicensed vessels.

A practice closely related to piracy was the treatment meted out to persons or goods afflicted by shipwreck. In the West as well as in the East, there existed at the time a customary "right" of the coastal populace or their overlords to take the wrecked ship and its cargo as a good prize; often the crew was reduced to servitude. Legislative reaction against this "law of shipwreck" began earlier and was more common than the one against piracy.⁷⁴ Emperors, kings, and other potentates, as well as the ecclesiastical authorities, vied with one another to abolish that "law" and to threaten severe punishment to the malefactors. Although these measures started in the ninth century and were sometimes embodied in treaties, the spoiling of wrecked ships as a matter of alleged right vanished only by the end of the Middle Ages.

In retrospect it should be noted that the preceding discussion of commercial and maritime rules bears essentially on local (national) laws—laws, however, that originated in international relations and often contained the seeds of genuine international law of the future. The prevalence of unilateral franchises based on local law has various reasons. Unilaterality served to emphasize the grantor's supremacy and the revocability of the grant; sometimes the grantor's country was not developed enough commercially to be interested in reciprocity; in the case of Islamic countries religious inhibitions, as will be seen, worked in the same direction. And of course the recipient nations would prefer the unilateral form over the obligations imposed by conventions. Characteristically enough, Venice, when she had built up sufficient power—that is, from the later tenth century on—succeeded in having her former compacts with the emperors replaced by imperial grants.⁷⁵

It goes without saying that what legally constitutes unilateral action of a sovereign is ordinarily the result of an understanding with foreign groups or rulers. The texts of franchises sometimes expressly refer to that understanding. The border line between unilateral and bilateral arrangements is, therefore, fluid. Still, full-fledged international treaties of a commercial character were not lacking in the Middle Ages. Again Italy was in the fore⁷⁶ through numerous compacts contracted by the Italian city-states not only among themselves but also with foreign cities (e.g., French Narbonne) and, as will be seen, with Oriental rulers. The inter-Italian conventions were rather diversified; they included, for instance, regulations for the general safety of communication and travel.⁷⁷ Farther north, England definitely led in this field.⁷⁸ France followed only late in the fifteenth century. But those medieval conventions were very different from a typical modern treaty of commerce. Only in the eighteenth century was the separation of political and commercial treaties deliberately inaugurated.⁷⁹ In the Middle Ages commercial arrangements formed part of political conventions, such as truces or peace treaties. The medieval pattern is still reflected by the remarkable *Intercursus Magnus* of 1495 between Henry VII and the Duke of Burgundy, ruler of the Netherlands.⁸⁰ Under the treaty English merchants might bring ships and goods into Flanders, and Flemish into England, might stay and depart freely, sell and buy merchandise and occupy warehouses and other buildings, subject only to ordinary dues and tolls. The elaborate compact, consisting of thirty-six chapters, is interspersed with provisions of a purely political nature and exhibits features peculiar to the period, such as a clause permitting foreign merchants and their men, in a group of no more than forty to carry arms between their ship and their lodgings. This type of convention was rightly considered as semipolitical and denoted by writers as "alliance for commercial purposes" (*foedus commerciorum causa*).

At variance with the modern type of commercial treaties, medieval arrangements are little or not at all concerned with tariff problems. The duties and fees charged to foreign merchants were varied and, for the most part, were determined by custom. One-sided and arbitrary increases were a matter of small concern, because protectionist and other mercantilist policies were on the whole foreign to the period; loss of profit to the local ruler through reduction or discontinuance of foreign trade apparently was a sufficient deterrent to such increases.

Still, in the practice of Italian city-states duties were sometimes fixed or reduced by way of agreement ⁸¹—an anticipation of modern tariff arrangements.

In addition to commercial conventions we encountered in the Middle Ages monetary treaties between neighboring princes or municipalities aimed at creating common standards of coinage, or at least rendering the currency of one country legal tender within the other. A multipartite standardizing agreement of this type, the *Rappenmünzbund* concluded between rulers of the Upper Rhine area, persisted through almost two centuries, a rare phenomenon for the Middle Ages. In the international area monetary understandings between England and Burgundy (for the Netherlands) made their appearance toward the end of the Middle Ages.⁸²

The most-favored-nation clause, which grants to a nation rights conceded, or to be conceded in the future, to other nations, is also found in the Middle Ages, though by no means so often as in modern times.⁸³ It occurred more frequently in unilateral franchises than in treaties, and it differed from the modern type also in that it was little concerned with customs duties; its subject matter was rather the personal rights of the merchants. Moreover, the medieval clauses dealt, on the whole, only with the extending of favors to specific commercial rivals of the grantee,⁸⁴ whereas the modern clause encompasses favors granted to any nation whatsoever.

The "national-treatment" clause so common in modern commercial treaties, which confers, in specified matters, upon foreigners the rights enjoyed by nationals, is found here and there in franchises granted by medieval rulers; in a few instances the clause was embodied in treaties.⁸⁵

Various international phases of medieval commercial and maritime law, as outlined above, are illustrated by the history of the Hanseatic League.⁸⁶ The League consisted at its flourishing period—that is, in the fourteenth and fifteenth centuries—of about seventy German cities, some of them, like Riga, outside the Empire. For the most part Lübeck was its leader. The League was not a confederation, much less a federation; but despite its commercial, naval, and political might—it long dominated the Baltic area and more—it was legally a loose type of association. International negotiations were not conducted by the League, which had not even a common seal, but by individual

member towns—normally Lübeck and others prominently interested in the particular situation—though the advantages might accrue to all members. England, Flanders, the Scandinavian countries, and to a lesser degree Russian states ⁸⁷ were the main trade and treaty partners of the League.

Through its achievements in commerce and navigation, but also through political and naval pressure, the League won extensive franchises in important marts. These franchises were not limited to the granting of safety for persons and goods and to the freedom of commerce and navigation, but they included the right to have, within a definite area, buildings for personal and trading purposes, landing places, churches, graveyards, etc. The main permanent settlements of the League, called *Kontore* (counters), were established at London—with the famous “Steel Yard”—at Bruges, Bergen, and Novgorod. The members of a *Kontor* formed a self-governing association under the authority of the League. Generally Lübeck law governed; the conception of the “personality of law” ^{87a} was still sufficiently alive to make such an autonomy acceptable to the local rulers.

An unusual feature of international practice pointed to the powerful position of the League: its use of the trade boycott as a weapon against foreign adversaries. The boycott decreed by a resolution of a *Hansetag* was binding upon the members of the League. It was peaceful, inasmuch as it did not include naval or other armed action; it was rather a precursor of the “tariff wars” of the nineteenth century which, however, did not lead to a complete discontinuance of trade.

The history of the League in relation to England offers particular interest from the legal angle. The English kings, who favored foreign merchants for the well known fiscal reasons, were supported in this policy by Parliament and nobility, but opposed by the cities which kept a sharp eye upon royal franchises lest they violate the “liberties” of the cities. A long and complicated legislative development started from this conflict in the middle of the twelfth century. The Hanseatics were successful, on the whole, and they far outdid their Continental rivals, such as the wealthy Lombards. In addition to being the main beneficiaries of England’s favorable mercantile legislation, the Hanseatics gained privileges of an unusual kind. Not only were they allowed to have their own courts for internal controversies, but mixed tribunals were provided for disputes with Englishmen. And these concessions were largely one-sided. Strangely enough, the

Hanseatics were long able to deny the English reciprocity for trading in Hanseatic towns. Only in a treaty of 1436 did they have to make concessions in this respect.⁸⁸ The peak of the League's position was reached by the Treaty of Utrecht in 1474,⁸⁹ which was concluded on the English side by Edward IV with the assent of Parliament. The privileges of the League were declared to take precedence over the "liberties" of the City of London; the Hanseatics were entirely exempted from the jurisdiction of the Admiralty courts and other English courts, and from certain internal tolls. In legal terms this was a tremendous success, explicable by political difficulties in which Edward IV found himself. Actually the League had then passed the zenith of its power. It was not able much longer to maintain its precious privileges, which faded completely during the reign of Elizabeth.

THEOLOGICAL DOCTRINES

The outstanding contribution of the Middle Ages toward doctrines touching international relations consists of the theological revival of the Roman doctrine of just war.⁹⁰ That doctrine was resuscitated and altered in the Christian spirit by St. Augustine (354-430) in connection with the objections on the basis of the Scriptures which Tertullian (160-230) and other early Church Fathers had raised against Christian participation in war and military service. In this situation St. Augustine opened a middle road by firmly approving such participation while requiring that the war be just. War may be justly waged, he explained, for the avenging of injury suffered—when one must vanquish by armed forces a city or a nation which is unwilling to punish a bad action of its citizens, or which refuses to restore what it has unjustly taken; never ought a war to be begun out of craving for power or revenge. Like Cicero, St. Augustine insisted that war should serve only as a means for obtaining a tranquil peace. He did not directly link the outcome of the war to the justness of its cause; the outcome might be a chastisement or a purification willed for a higher purpose by Divine Providence. The Final Judgment would decide as to salvation or damnation.

Inasmuch as St. Augustine applied his tenets to an interpretation of the history of the Roman Empire, they may be considered as aspects of a philosophy of history; basically they form part of a religious and

moral philosophy concerned with individuals. In practical politics they were the given doctrinal basis for the Church's struggle against feuds. No wonder theologians were deeply concerned with the subject of just war. Among the earlier authorities in the field was the Archbishop Isidore of Seville (560–636), a scholar outstanding in the transmission of the treasures of ancient knowledge to the Christian Era. He relied heavily on the Roman, and particularly the Ciceronian, formulas on just war, thus bringing into relief the continuity of ancient and medieval tradition. His contribution to the subject of *jus gentium* was more original. He accepted *jus gentium* with Gaius in the sense of universal law, yet he modified the Gaian definition by admitting that a law recognized by "almost" all nations is sufficiently universal, a qualification adopted and carried over to international law by later writers. More remarkable, Isidore of Seville offered only those instances of *jus gentium* which are included in modern international law: the occupation, erection, and equipment of strongholds; wars; captivity; alliances; peace treaties; truces; sanctity of ambassadors; and so forth. The discernment behind these instances is a surprising anticipation of much later doctrines, though it is somewhat beclouded by the author's adoption of another concept of Ulpian, the *jus militare*, which in Isidore's discussion embraces such points of international law as declaration of war and alliances, together with sundry military subjects, for example, discipline and ranks. Even here one may find another anticipation of later development, inasmuch as centuries afterward Spanish thought turned to a similarly conceived topic of military law.

Important as Isidore of Seville's teachings were, they were far overshadowed by those of Thomas Aquinas (1225–1274). In the Second Part of his *Summa Theologica*, Thomas Aquinas answers the question "whether it is always a sin to wage a war" in the negative provided (1) that the prince has authorized the war (that there is *auctoritas principis*); (2) that there is a *justa causa*—to wit, that the adverse party deserves to be fought against because of some guilt of his own (*propter aliquam culpam*); and (3) that the belligerent is possessed of a *recta intentio*—namely, the intention to promote the good or to avoid the evil. *Auctoritas principis*, according to modern conceptions, would appear to be a prerequisite of war rather than of just war; but this situation was different in Aquinas' day of bloody feuds. Which princes were vested with that power, he did not say.

The essence of the Thomist doctrine was the prerequisite of *justa causa* of war. Since it was conceived, like the other prerequisites, as a norm of moral theology—which is the core of the Second Part of the *Summa Theologica*—it follows that the matter of just war belongs within the jurisdiction of the Church.

In substance this does not go much beyond the tenets of St. Augustine; but it is primarily through Thomas Aquinas' immense authority that the just-war doctrine became the cornerstone of the Roman Catholic doctrine on war. By his superior formal analysis of the problem, a framework of discussion was provided which was invariably followed by the scholastics and utilized also by other writers.

As has been indicated, Thomas Aquinas conceived the just-war doctrine as a part of moral theology; but there was natural kinship between moral theology and jurisprudence, and there was certainly a kinship between a religio-moralistic just-war doctrine and international law. This relatedness was brought into relief by the development of the confessional, which more and more required a casuistic treatment of moral principles for the use of the confessors. It is easy to see that, once the principle of casuistic elaboration is applied to the just-war doctrine, practically all topics of international law may be drawn into its orbit: territorial sovereignty may be contemplated from the viewpoint that its violation furnishes a just cause of war, and the same approach may be made to the law of treaties, to the law of embassies, and so on. Actually, the casuistic treatment of the just-war doctrine was undertaken on a larger scale only in the post-medieval era; but the origin and the spirit of that pre-stage of international law were medieval.

The medieval background also explains the breadth of the war concept within the scope of scholastic doctrine, which must not be primarily understood in terms of wars between independent nations. The pertinent section of the *Corpus juris canonici*, contained in the *Decretum Gratiani* (1150),⁹¹ is concerned with a bellicose expedition of Catholic bishops against heretic bishops and their followers. This was an unusual situation; but the medieval doctrine applied also to civil wars and to ordinary feuds, which were particularly affected by the prerequisite of *auctoritas principis*. Hence, the doctrine fitted into the broad action of the Church against the feuds. Generally speaking, the medieval war concept includes armed conflicts between any organized groups—that is, “public” wars as well as “private” wars, to

use these ill chosen but accepted terms. The rules requiring a war to be just—strengthened by the powerful sanctions we have mentioned—extended therefore over a vast field.

A shortcoming of medieval scholastic doctrine, or rather of its hardening at the hands of the later scholastics, consisted in the concentration of doctrinal interest on the prevention of war. Regarding warfare itself, Thomas Aquinas, while permitting stratagems, forbade lies and violation of promises in warfare; and these tenets became customary topics in later discourses on just war. Besides, the doctrine was stretched so as to bar certain excesses, particularly the killing of women and children, on the theory that "war" against them was not "just." However, this approach was inadequate to the great humane problems of warfare; and the relative indifference of the medieval Church toward them is believed to be a reflection of its narrowness. Other weaknesses of the theological just-war doctrine, which made themselves more felt in the post-medieval age, will be dealt with in the following chapter.

Not only the just-war doctrine but another ancient conception bearing upon international relations was adopted and remodeled in the Christian spirit during the Middle Ages—that of natural law.⁹² The Church Fathers integrated natural law into Christian theology as a divine law above human law, nature being conceived as a manifestation of God. Thomas Aquinas amplified and redefined this doctrine. He distinguished the eternal law—that is, the eternal plan of God's wisdom, by which the universe is ruled beyond human comprehension—from the natural law, which is the necessarily imperfect participation, willed by God, of human reason in the eternal law. The supreme principle of this natural law is to seek the good and to avoid the evil. In a broader sense natural law extends to animals and even to all created substances; but with these cosmic aspects of Thomist philosophy we are not concerned. In the moral meaning natural law has proved a prolific source of thought on international relations. The modern reader must keep in mind, however, that the scholastic notion of natural law is not to be understood juridically; it encompasses both moral (or ethical) and legal norms. This fact is also important for a correct comprehension of Aquinas' idea of just war. Although that idea was not formally integrated into his discourse on natural law,

and sprang indeed historically from a different root, it must be viewed against the background of his broad moral notion of natural law.

While thus, in the Thomist system, law and morality stand undivided in their essence—a view firmly maintained up to the present day by Catholic theologians—the main line of demarcation within the framework of Thomist, and generally of medieval, politico-theological doctrine runs between the natural law of divine origin and the “human” law. These two laws, however, were not considered as being on the same plane; at variance with ancient teachings, natural law was held superior to human law. In the dominant view of the Middle Ages, statutes, judgments, decrees, and, in general, all legal transactions were null and void if violative of natural law. While the ultimate decision rested with the Church, in principle everybody was allowed to challenge the validity of the laws or other commands of the authorities through the invocation of natural law. In the last analysis, this theory reflects the weakness of state power.

Thomas Aquinas was less interested in the problem of *jus gentium*. It is difficult to explain and to reconcile his scattered remarks on the subject, but we need not discuss here the solutions proffered by the theologians.⁹³ In any event the remarks and their interpretation have had no bearing upon the history of international law. Regarding *jus gentium*, the teachings of Isidore of Seville have been more significant.

It was different with the conception of natural law. Thomas Aquinas’ teachings not only have remained authoritative within the orbit of Catholic thought, but have notably influenced non-Catholic writers. However, in international relations the natural-law doctrine was not brought into full play until the Middle Ages had passed.

LEGAL DOCTRINES; PROJECTS FOR PERPETUAL PEACE

Avenues to international law were opened also by medieval legal literature.⁹⁴ Once more Italian leadership was apparent. The *Corpus juris civilis*, which had been introduced in Italy when Justinian conquered the country, was, we know, still considered the Empire’s secular law. In the twelfth and thirteenth centuries, the systematic study of Roman law was begun at Bologna and other Italian universities; it found its literary expression in “glosses” appended to the text of the *Corpus juris*—a primitive method generally characteristic of that early

period. The climax of medieval jurisprudence was attained by the Italian Post-Glossators or Commentators of the fourteenth and fifteenth centuries, who, in addition to extensive teaching and consultative activities, wrote independent dissertations on the most varied problems of law. Their greatest representative, who despite his early death became the most famous jurist of the Middle Ages, was Bartolus (1314–1357), Professor in Perugia;⁹⁵ the next in importance was his disciple and successor, Baldus (1327–1410).

The disintegration of the Empire, not yet followed by a corresponding shift in law and political ideology, placed the medieval jurists in a dilemma. Bartolus recognized the Emperor as the Lord of the World, declaring a denial of this truth to be heretical; at the same time, however, he considered the Italian cities as *de facto* free and independent. Baldus went a step further: he accepted a tenet of French origin under which “a king is emperor within his realm” (*Rex in regno suo est Imperator regni sui*)—a formula conceding to the kings all the prerogatives reserved to the Emperor in Justinian’s *Corpus juris* and elsewhere. There was one qualification, however: Baldus maintained that only the Emperor and the Pope had authority to wage a war, and other belligerent princes and their men should be treated as brigands not entitled to the benefit of the law with respect to prisoners of war, booty, and so forth.

While these problems bore primarily upon the Empire’s constitution, other studies of the Italian jurists came nearer to international law. Bartolus wrote a classic tractate on reprisals, supporting the laudable efforts of the Italian statutes and treaties. He furthermore strongly objected on legal grounds to the servitude of Christian prisoners of war, thereby aiding the endeavors of the Church. Concerning booty, he took a progressive view by requiring the captor to deliver the booty to the captor’s prince for distribution.

The most lasting contribution of the Commentators to the history of international law in its broader aspects consists in their inauguration of what today is generally called private international law.⁹⁶ This branch of legal science centers about the rights and duties of individuals where the relevant facts are wholly or in part foreign. Particularly, private international law answers the question of the “choice of law” which arises in legal transactions involving two or more countries having laws of their own. Obviously, there must be in this frequent situation rules which determine the applicable local law. The

term "private international law," sometimes misunderstood by lay writers, is not fortunate in this use, because relations among independent states are not in point; in England and America the name (law of) "conflict of laws" has become more popular. Though theoretically heterogeneous, private international law is closely related to international law proper from a practical point of view.

The prime stages of private international law may be found in antiquity. When the barbarians, in the Great Migration, had swept into and broken up the Roman Empire, they continued to live under their native (Langobardian, Frankish, Gothic, etc.) laws while the Romans in the conquered territories remained under Roman law.⁹⁷ This primitive system, which has emerged also elsewhere, has been called "personality of law," because the ethnic bond of a person—then his or her crucial characteristic—determined the law applicable to his or her legal relations; in important legal transactions the parties, by stating their ethnic affiliation, would thereby indicate the law to which they were subject (*professiones juris*). Personality of the law has sporadically survived in colonies and other territories with a racially or religiously mixed population (for instance, in Algeria for Arabs and Kabyles). Where, however, ethnic segregation vanished and legal transactions occurred more indiscriminately among the members of various ethnic communities, new solutions had to be sought. This necessity became urgent as a result of the signal evolution of the Italian city-states. The growing number of their local statutory laws and the manifold personal as well as business relations of their citizens caused the question of the "choice of law"—that is, of the applicable local law—to arise frequently, with no solution derivable from the old notion of personality of law. The Commentators, and first of all Bartolus, developed a new body of rules designed to furnish the necessary directions for the choice of law. These rules would tell, for instance, whether a deceased citizen of A, who had left property situated in B, was to be succeeded according to the law of A or the law of B; whether the effects of a contract made in A but to be performed in B were to be determined under the law of A or under that of B; or whether, in a suit brought in A on a transaction made in B, the Statute of Limitations of A or that of B would govern. In cases of this type the Commentators would examine whether the statute in question—say a statute on succession—related to persons (*statutum personale*) or to property, especially to real property (*statutum reale*); in the first

case they would apply the law of the domicile of the person involved; in the latter case, the law where the property was situated. To the "personal" and "real" statutes they added a third group of indistinct meaning, the "mixed" statutes. This so-called theory of statutes, leading perforce to artificial and empty distinctions, was through nebulous dialectics represented as derived from and based on the authority of the *Corpus juris civilis*. The goal was certainly laudable, the proposed rules being by and large satisfactory for that period; in reality the *Corpus juris* said nothing about private international law, simply because the problem had not arisen within the area of the ancient world dominated by Rome.

However, one must not expect in this early era of revived scientific thought the methods of proof which are required today. The scholastics supposed an argument to be based on officially accepted and unimpeachable authority: in the law, primarily on the *Corpus juris*; in theological matters, primarily on the Scriptures and the writings of the Church Fathers. From the given dogmatic and authoritative premises—with little regard to their historical setting—conclusions were drawn by means of formal syllogism and verbal analysis which frequently resulted in the odd and hairsplitting arguments which have come to be popularly identified with scholasticism. Mysticism is another factor in scholastic dialectics, especially in theology. The famous medieval theory of the Two Swords may serve as an illustration. The two swords exhibited to Christ by the disciples, Christ saying, "It is enough" (Luke 22:38), were taken to refer to the two powers, the spiritual and the temporal, and at the same time to indicate that the ultimate control over the two swords had been entrusted by Christ to the Church; which practically meant that the Pope retained ultimate control over the temporal sword handed by him to the Emperor. While this particular theory met with early opposition, the scholastic method remained dominant during the Middle Ages and greatly influenced scientific thought in the first centuries of modern times.

To supplement our outline of medieval contributions to international law, a glance may be taken at a particular type of political thought that originated in the Middle Ages—the projects of reconstruction of the political world for the attainment of perpetual peace.⁹⁸ The first project of this kind is associated with the name of the French lawyer Pierre Dubois (about 1250–1312).⁹⁹ In a pamphlet *On the*

Recovery of the Holy Land (1306), Dubois postulated, as a prerequisite of a new crusade, the establishment of universal peace throughout Christendom. This goal he proposed to attain by a general council of all prelates and secular Christian princes, to be convoked and presided over by the Pope. The council once established, war among its members would be outlawed. Disputes were to be settled by arbitral tribunals with three prelates and three secular princes for each party; the arbitrators, it seems, would have to be chosen—by whom it is not clear—from a large panel set up by the council. Against the decision of the arbitrators appeal would lie to the Pope. A violator of the peace so covenanted would be subdued by the joint armies of the other members of the council; he would be deprived of all his property and possessions and banished to the Holy Land (*sic*) where he might use his military talent against the infidels. A striking aspect of the project was the elimination of imperial prerogative; Dubois quite frankly envisaged a hegemonial position for France.

In this pamphlet, as well as in other writings, Dubois dealt with the most varied political and legal topics, particularly with the reform of the Church. Gifted with a lively style and given to brilliant propositions, he has been dubbed the greatest journalist of the Middle Ages.

Regarding the history of international law, a certain merit of Dubois consists in the fact that he was the first writer to conceive the idea of something like compulsory arbitration based on a political organization of the civilized world. For this reason he has earned much admiration in the present century; but the idea of arbitration, as has been seen, was familiar to the Middle Ages and what he added to it is rather obscure. Generally speaking, his project lacks any effort toward sustained reflection and has in no way influenced political or doctrinal developments.

Independently of Dubois, in later centuries others conceived, and proposed in actual politics, a federation or coalition of Christian states to fight the Turks. Thus, in 1462, King George Podebrad of Bohemia tried to win King Louis XI of France for an alliance against the Turks through a scheme prepared by the French adventurer Marini, who was an adviser to the Bohemian king.¹⁰⁰ Under this scheme the proposed federation between the two rulers was to be extended to other princes. The plan provided, vaguely, for a permanent council with broad compulsory powers over the federated states, and for a permanent federal tribunal. There was little regard for imperial or papal

prerogatives. That feature of the project was such as to attract Louis XI, as was the hegemonial position in which he was to be placed as the convoker of the planned council. However, the whole scheme was too fantastic to be acceptable to Louis XI or to anybody else.

A kindred idea, however, was actually incorporated in a treaty—namely, in the convention concluded in 1518 between Henry VIII of England and Francis I of France.¹⁰¹ The treaty envisaged a league against the Turks, and at the same time against any aggressor whatsoever, with the ultimate goal of universal peace. The other Christian princes were invited to accede within eight months, although no organization of the proposed federation was provided. As a matter of fact, the conclusion of the treaty was no more than an ephemeral action, a move in the diplomatic game of Cardinal Wolsey, who thereby thwarted a similar idea promoted by Pope Leo X. The league did not materialize, and the whole scheme was soon abandoned.

All these projects (the 1518 convention was not much more) as well as later schemes which will be mentioned in the following chapters¹⁰² have recently been heralded as forerunners of the League of Nations. Apart from the fact that many of them demanded war against the Turks, it should be noted that the connection or similarity to the League is purely external. Those projects were no more than vagaries of thought or deceptive political schemes. They were possibly expressive of contemporaneous trends (for instance, of the waning of the Emperor's prestige), but they were not links in the historical process leading to the League. While nothing is easier than to unleash political phantasy, the resulting projects are worth while only where they are substantially related to existing political conditions and may influence, affirmatively or negatively, the course of events. If not, the similarity of old projects to new phenomena merely constitutes an interesting curiosity.

CHAPTER III

The Middle Ages—East

THE EASTERN ROMAN EMPIRE ¹

The division of the great Roman Empire into a Western (Latin) and an Eastern (Greek) part was decreed by the last will of the Emperor Theodosius (d. A.D. 395). Under the menace of the Northern barbarians the center of the Empire's gravity had then already shifted to the East. As early as 330 Byzantium (Constantinople) was made a capital of the Empire. In 476 the Western Empire broke down under the assault of the barbarians; but the Greek Empire held its ground until 1453, when Byzantium was conquered by the Turkish Sultan Mohammed II. Byzantium remained the most illustrious seat of Christian civilization down to the seizure and ferocious pillage by the Western crusaders in 1204. This fact has long been neglected in Western historical learning and teaching. The center of the Eastern Empire was Asia Minor, Greece, and the southern Balkans; at times the Empire encompassed Egypt (lost to the Arabs in 641) and other North African lands, Syria, Palestine, Cyprus, the northern shores of the Black Sea, Sicily, and large parts of Italy—including, for about two centuries, Rome.² The range of the Empire was shrinking at an ever accelerated pace. There was a recovery in the ninth and tenth centuries; but ultimately the Empire was reduced almost to the capital, its environs, and parts of Greece.

The position of the Byzantine Emperor (basileus) was much stronger than that of the ruler of the "Holy Roman Empire."³ The basileus did not depend on electoral princes, and the exercise of his powers was not restricted by constitutional or feudal rules. His sway was absolutist and despotic; "autocrator" (that is, ruler by his own right) was his official title. Like the pagan Roman emperors, he was considered as a divine being; surrounded by oriental pomp, he had to be approached in rituals of abject prostration and adulation. The Patriarch of Constantinople, head of the Eastern Orthodox Church,

was not formally subordinated to him, but for the most part the Church actually was an instrument of imperial might. It is for this reason that the Emperor's power has been called "cesaro-papist." The Roman Pontiff was never very influential in the East, and in 1054 the Roman Catholic and the Greek Orthodox Church parted formally when the Constantinople Patriarch and his followers were excommunicated by Pope Leo IX.

The Emperor's exalted status, derived as it was in direct lineage from the old Roman emperors, remained unmatched in Christendom until the time of Charlemagne. No wonder, therefore, that the basileus was considered internationally as a source of titles and honorific emblems for rulers in the East and the West, competing in this respect with the Pope, and later with the Western Emperor.⁴ The Ostrogoth king Odoacer, conqueror of Rome, was eager to obtain from the Greek Emperor the title of "*patricius Romanorum*"; Theodoric the Great, another Ostrogoth ruler, received also the title of "consul." The proud Clovis I, King of the Franks (481-511) was likewise made a *patricius* and a consul; his successors called themselves "sons" of the Emperor, and their coins bore his effigy. As late as 1075 the ruler of Hungary accepted the title "king" from the Greek Emperor. Crowns and other insignia accompanied the imperial favors. A distinct hierarchy was established for the foreign rulers in their relations with Byzantium, invariably under the assumption of the Emperor's preeminence. Even Charlemagne found it necessary to obtain for his new title the recognition of the Greek Emperor, which was granted reluctantly by the treaty of Aix-la-Chapelle (812).

Another legal emanation of the Eastern Empire in the international field was the expansion of the Orthodox Church beyond the borders of the Empire, especially into Russia. True, this expansion, which we shall discuss later, was achieved on the basis of ecclesiastic law; but its secular significance is high-lighted by the fact that the basileus claimed suzerainty over the Russian princes on the ground that they had accepted the Christian faith. It is significant that in the ninth century the pagan Khazars in southern Russia accepted the Jewish rather than the Christian faith in order to escape the supreme authority of both the Greek Emperor and the Pope.⁵

The outstanding contribution of Byzantium to international law consists in the elaboration and refinement of diplomacy and treaty

practice. Unlike the Western Emperor, the basileus was permanently called upon to negotiate agreements with neighboring potentates, especially the King of Persia, with Russian and Bulgarian princes, the Italian city-states, the caliphs of Bagdad and Egypt, and minor Moslem rulers. In all these and other foreign relations the Emperor's absolute power gave him a free hand. Byzantine diplomacy was organized and developed so as to become a model for Eastern and Western countries. To give an example: treaties had to be executed by both sides in duplicate, one copy to be retained for the home archives, and the other, together with a certified translation, to be exchanged for a copy signed by the co-contracting party. And, of course, ceremonials for the reception of envoys to the imperial court were painstaking and awe-inspiring. The Roman rule of the inviolability of envoys under *jus gentium* was incorporated in Justinian's *Corpus juris*, though in a rather reserved form;⁶ and not even to that extent was the rule always respected.

Regarding the treaties themselves, manifold new types of provisions were inaugurated by the diplomacy of the Eastern emperors. The flourishing commerce and industry of Byzantium—for centuries the trading center between Europe and Asia—led to a refinement, unique at least until the eleventh century, of commercial conventions. A fitting background for the latter was provided by strict regimentation of sojourn and activities of foreign merchants as well as by a system of taxes laid upon imports and exports, or upon the sale of imported goods and the purchase of goods for export. The rate of taxes ordinarily was 10 per cent—an instance of "tithes" widespread in the Levant. The conventions with Russian princes and the Italian city-states⁷ belong primarily to this group. Compacts with the caliphs were predominantly peace treaties and were military in character. One remarkable feature, apparently of Arabic origin,⁸ was the large-scale exchange and ransoming of prisoners; the treaty of 804 between the Caliph Harun al-Rashid of Bagdad and the Emperor Nicephorus is an instance of this. From the later (Turkish) period of Islam, we mention the fateful agreement concluded in 1361 between the basileus and the Turkish Sultan which created in Constantinople an autonomous Turkish settlement under a *cadi*.⁹ Turkish pressure compelled the basileus to make this concession which foreshadowed the downfall of the Empire. Generally, treaty relations with the world of Islam were very common; and, contrary to the conceptions of Western

Christianity, the Eastern emperors felt little inhibition against entering into alliances, even of an aggressive type, with Moslem princes. In religious matters also the Eastern emperors exhibited toward the Moslems a tolerance unknown to Western Christians.¹⁰

From a legal viewpoint, however, the most interesting examples of Byzantine treaty-making are the sixth century peace conventions between Byzantium and Persia,¹¹ particularly the one contracted in 562 by Emperor Justinian with Chosroes I of Persia. This treaty initiated the stipulated protection of religious minorities, a subject that was to assume great importance in later periods. Chosroes I promised to grant Christians the right of what was later called "public" worship; viz., they were allowed to have churches and graveyards in Persia, and they were released from participation in the Zoroastrian cult (Persia's official religion); they had merely to refrain from proselytizing. Justinian did not undertake to extend a similar toleration to the followers of Zoroaster, but he obligated himself to bar the immigration of Persian Christians who were for the most part Nestorians, and even to extradite violators. (Chosroes I probably wanted to keep them because of their wealth or skills.) The treaty also contained something like a "demilitarization" clause: no new fortifications were allowed at the common frontier. As a juridical nicety one might mention a forfeiture clause effective in the case of violation of certain treaty obligations. The whole convention bears witness to the advanced civilization of the two countries. Probably the Greeks were primarily responsible for the juristic refinement of the convention. Nevertheless, it was broken by Justinian's successor, Emperor Justin II, as early as 572.

While the Byzantines were by no means alone in breaking treaties—the Persians had broken one with them before—moral insensibility and ruthlessness were conspicuous in the public life of the Greek Empire. The unbridled power of the emperors also distorted the conception of war. The Emperor, being God's viceregent, was free to make war as he saw fit; to be brought under his domination was rather deemed a blessing, and resistance a rebellion. Under such a notion arbitration with other princes was unthinkable, as it would presuppose equality. The most an emperor would allow was a mixed commission for the negotiation of an agreement.

The presumptuous attitude of the emperors assumed an interventionist character in the case of Christians living outside the Empire.

They thought of themselves as the born protectors of these Christians, as revealed by the peace of 562; and when the Christian Armenians rebelled against Persian rule after the conclusion of the peace, the Emperor Justin claimed the right to assist them regardless of the peace.

Under such conditions a discerning doctrine of "just war" obviously could not exist. It is remarkable that Justinian's *Corpus juris* makes no use of that venerable Roman conception. Nor did the medieval Orthodox Church give rise to an elaborate moral theology similar to that of the Catholic West. Hence, the main wellsprings of the law of nations did not exist in the East—a diversity which contributed much to severing Western and Eastern thought on international matters. Even in actual warfare the East surpassed the savagery of the West. The unbridled cruelty of the Greeks was notorious; it included the blinding of prisoners of war.

RUSSIA

In the beginning of the tenth century, when Russia emerged from the umbra of her pagan past, she entered immediately into two important international compacts; the Varangians—Russified Scandinavian warriors and traders who had traversed Russia from the north—established contact with the Greek Empire as they settled on the northern shores of the Black Sea. From there the Varangian prince Olag undertook in 907 a successful campaign by land and sea against the Empire, which was halted only at the walls of Constantinople. A peace treaty was concluded in the same year and revised in 911.¹² It reflected the adverse military situation in which the Emperor found himself. Consequently, he undertook to pay tribute to the Varangian princes, and he granted them valuable concessions in the commercial field. Russian merchants coming to Constantinople were to be quartered in a suburb and allowed, unarmed and in groups of no more than fifty, to enter the capital through a prescribed gate. The maximum stay was fixed at six months instead of the normal three months. They were exempted from certain taxes (at least, it seems, with regard to goods purchased), and, in the event of death, a Russian would be succeeded by his testamentary heir or by his parents, without a share going to the Emperor. However, there was no exemption from imperial jurisdiction and administration; in other words, "autonomy"

was not provided as in later Byzantine grants to Italian city-states.

The treaty of 911 is also the first instance of international abrogation of the law of shipwreck, and it extensively regulated the ransoming of prisoners. According to Russian sources, a prisoner was allowed to ransom himself by his work. Of special interest is a price-fixing clause for Russian slaves,¹³ who played a prominent part in Russia's export trade. This is the first attempt to organize slave traffic internationally.

Later Russo-Byzantine agreements brought about a number of changes. A treaty concluded in 945, when the Russian situation was less favorable, abolished the tax exemption and imposed a kind of "export quota": the Russians were limited in their purchases of silk to a value of fifty bezants each. Besides, they had to waive jurisdiction over misdeeds committed by Greeks in Russia. Despite these and other quarrels, Russo-Byzantine relations grew more and more intimate on the strength of spiritual bonds. In the hundred-odd years preceding 1100 Russia adopted Greek Orthodox Christianity. Since this resulted in a certain dependence on the Greek Empire, the Russians soon began the struggle for ecclesiastic and political emancipation. In 1037 the Patriarch of Constantinople appointed a Russian as metropolitan at Kiev. Later appointees were Greeks, and a limited autonomy of the Russian Church was established only in the middle of the fifteenth century, when a congress of Russian bishops elected a Russian metropolitan. He took his seat in Moscow but was still subordinate to the Constantinople Patriarch. With the fall of Constantinople in 1453 the situation became untenable; but only in 1589 was the metropolitan of Moscow raised to the dignity of a Russian patriarch with the consent of the Patriarch of Constantinople. The subordination under ecclesiastical law to the dominance of a foreign religious head was thereby ended.

Meanwhile, other changes had taken place in the structure of Russia, indirectly affecting international law. In 1472 Ivan III, Grand Prince of Moscow, constituted himself the ideological successor of the Byzantine Emperor. He married the niece of the last Emperor, who had perished in battle; he then adopted the coat of arms of the last Byzantine dynasty—the double-headed eagle of the Paleologi—and introduced at his court the Byzantine ceremonials. Moscow was to become the "Third Rome."^{13a} In 1547 Ivan IV, the Terrible, carried this policy further, causing himself to be crowned *Tsar*, the Slavic

version of "Caesar," a title which had often been used as an equivalent of "basileus."

Returning to the medieval period, we find Russia, since the second half of the eleventh century, divided into a number of independent principalities. Under the pressure of the Mongol invasion (1238-1462) the princes concluded numerous compacts, often verging on vassalage, among themselves and sometimes with non-Russian princes.¹⁴ In inter-Russian conventions they called themselves "brothers"; a Grand Prince was the "older" brother. A feeling of kinship, in the face of the Mongols, seems to have been behind this usage. A similar sentiment probably accounts for the frequency of clauses on arbitration or conciliation.¹⁵ According to them, controversies were to be decided by mixed courts or commissions. In the event that these bodies could not agree, a decision by a super-arbitrator was sometimes provided; he was nominated by the agreement itself or had to be chosen by later accord.¹⁶ The latter arrangement, of course, tended to blunt the whole arbitration agreement. In fact, these agreements should not be overrated.¹⁷ Of actual arbitral decisions between Russian princes there seems to be no record. The situation bears, perhaps, a remote resemblance to that of ancient Greece.

ISLAM ¹⁸

The Islamic law on international relations is scanty and vague, except for some aspects of war. Islamic law is based on the Koran compiled shortly after Mohammed's death (632). The Koran is considered all-comprehensive and is, therefore, closed to amending legislation. The actual Islamic law is largely the result of interpretation and implementation by the scribes (muftis and other religious or legal authorities). These authorities differ widely, particularly according to countries and periods. With a disparity between theory and practice which is no peculiarity of Islam, they failed to develop an approximate uniformity such as that attained by the centralized system of the Catholic Church.

The subject of war is central in Islamic doctrine on international relations.¹⁹ While the Moslem countries are conceived as a political unit (*dar-al-Islam*), there exists a latent state of war between the Moslems and the infidels. The actual war against the infidels is a holy war (*jihad*),²⁰ but opinions seem to differ as to whether it is so in

itself or only after the issuance of a formal declaration by the competent authorities. Every able-bodied Moslem has to join such a war; and death in battle will open the gates of paradise, the pleasures of which (by no means spiritual only) are depicted in the most elaborate manner. Medieval exegetic literature on the Koran is to a great extent concerned with the diverse aspects of warfare.²¹ A modern Arab scholar is right when he describes the Islam doctrine as bent on conquest, in contradistinction to those of the Old and the New Testament.²² On the other hand, Moslem ideas on warfare are in some respects superior to Christian conceptions of the same period. A proclamation of Caliph Abu Bekr (died 634), Mohammed's first successor, is significant. He warns his victorious soldiers to spare women, children, and old men; he exhorts them not to destroy palms and orchards, or to burn homes, or to take from the provisions of the enemy more than needed; and he demands that prisoners of war be treated with pity.²³ Ransoming and the exchanging of prisoners were far more widely practiced in the East than in the West,²⁴ and in a number of cases prisoners received their freedom on a large scale by acts of generosity. Booty had to be delivered to the authorities for distribution, the treasury keeping one-fifth of it—a rule adopted, surprisingly enough, by the *Siete Partidas* of Alfonso X of Castile.²⁵

The hostility of Islam toward infidels was tempered by remarkable exceptions. The Koran, despite the paramountcy of Mohammed's teachings, embodied the Old and the New Testaments in the Islamic creed, and Christians and Jews received preferential treatment. As "peoples of the book" (*dhimmi*)—namely, of the Bible—they were permitted to stay in Moslem countries and to live there according to their own religions and under their own laws, provided they paid poll taxes and submitted to restrictions regarding their conduct and their garments.²⁶ Perhaps the most impressive application of the doctrine occurred after the fall of Constantinople, when the conqueror Mohammed II convoked representatives of the Greek Orthodox Church, of the Armenian Church, and of the Jews to tell them that they might stay in Constantinople under their own laws and the leadership of their religious superiors. Because the Orthodox Patriarch had died before the conquest, the Sultan caused the Greeks in Constantinople to elect a new Patriarch whom he treated with high honors. Still, autonomy for the Christians and the Jews was not merely an expression of respect for their religions. The Koran was considered to be much

too good for those unbelievers; they could, so to speak, stew in their own juice. This conception also accounts for the more or less degrading character of the restrictions laid upon Christians, and to a greater extent upon Jews. Even so—and the restrictions differed greatly according to time and place—both doctrine and actual practice held more tolerance in the Islamic than in the Western world.

Any Moslem originally had the power to grant any foreigner protection by a one-sided act (*amân*) which was binding upon the whole community.²⁷ The foreigner became thereby a *mustamîn*. This extraordinary privilege, which gradually came to be a prerogative of the competent authorities, was a residue of an Arab tribal custom of hospitality: a foreigner who entered a tent with the owner's consent was protected.

On the other hand, the notion of latent war with the infidels operated against countenancing a Moslem's sojourn in their lands. This obstacle, likewise a point of discussion in pious writings, was not insurmountable, especially where Moslems were allowed to have settlements under their own cadis.²⁸ Nevertheless, it was probably a momentous factor in treaty negotiations of Moslem rulers with Christian powers. Under its influence the former were little interested in procuring for their subjects the right to settle in Christian countries.

This leads us to the law of treaties, which forms an impressive part of Islamic doctrine.²⁹ In a celebrated sura³⁰ the Koran obligates the believer to keep his covenants even toward pagans (polytheists) until the end of the term, provided the pagans do not fail the Moslems in any way and do not help anyone against them; *a fortiori*, the same rule obtains in relations with Christians and Jews. And Abu Bekr, in the proclamation already mentioned, exhorted the soldiers as follows: "Let there be no perfidy, no falsehood in your treaties with the enemy; be faithful in all things, proving yourselves upright and noble and maintaining your word and promises truly." No dispensation from treaty obligations on religious or other grounds is provided by Islamic doctrine. The Koran especially proscribes the breaking of oaths,³¹ but the emphasis is on the keeping of promises. There was an opinion that a treaty might be canceled ahead of time if this was required in the interest of Islam. But even then a formal denunciation, it seems, was necessary.³² We are told that in 1571 Sultan Selim II, a ruler notorious for his depravity, broke his peace treaty with Venice in order to invade Cyprus, after having procured a favorable

legal opinion from the Mufti Aba Suud; ³³ and there may be more such cases. On the whole, however, the record of Islam is definitely good on this score. The crusaders, although aggressors, proceeded on the principle that no faith need be kept with infidels. Says the noted English historian Lane-Poole, with an eye to the crusaders, "The virtues of civilization were all on the side of the Saracens." ³⁴

However, the idea of latent war with the infidels did not permit a Moslem ruler to bind himself permanently toward a non-Moslem. Particularly, he might conclude a peace treaty with a non-Moslem only for a definite period, rendering it thereby a kind of truce. Most of the scribes would allow only a maximum of ten years; but the ruling, it appears, did not apply to unilateral and revocable grants, and it was not invariably followed, especially in the post-medieval era.

In the preambles to treaties the Moslem rulers customarily adorned themselves with utterly bombastic attributes which sometimes give the impression that they found therein a kind of compensation for the concessions they had to make. Oaths were not so common in conventions with the Moslems.

MEETING OF WEST AND EAST; CONSULS

Little contact of legal relevance existed between West and East during the earlier and greater part of the Middle Ages. An embassy which the Caliph Harun al-Rashid sent to Charlemagne in 801 did not lead to any convention, although the Caliph extended to Western pilgrims in the Holy Land privileges enjoyed so far only by the Greeks. The crusades, however, replete as they were with the fury of battle, offer, somewhat paradoxically, a unique example of international agreement in the treaty of Joppa (1229) through which Emperor Frederick II won Jerusalem, Bethlehem, and Nazareth from Sultan Al Kamil without bloodshed. In the Emperor's subtle diplomacy his sincere appreciation of Arabic culture was a most efficient element.³⁵ This action, as well as his lasting friendliness to the Arabs, was a shining incident in a sanguinary drama that dragged on through many centuries. On the other hand, the fighting itself gave rise to further interpenetration of Western and Eastern cultures. Great changes were brought about in Western learning, art, clothing, nourishment, and other aspects of life. The resulting desire, and in fact the need, for peaceful exchange, engendered a strong countercurrent

to the crusades. Across the shipping lanes of the Mediterranean there unfolded a flourishing commerce with the Arabic countries. On the Christian side Pisa, Genoa, Venice, and Aragon were in the fore; among the Moslem countries, Egypt, Syria, Tunis, and Morocco. The ecclesiastical anti-Saracen legislation, as has been seen, failed to stop this traffic. As far as Egypt, center of Moslem fighting power, was concerned, the treaties fell little short of betrayal to the cause of Christianity. It was with Egypt that the first important agreement was concluded by Pisa, in 1154;³⁶ and in 1208 Venice obtained from Egypt special trade facilities in return for her alleged good services in restraining the crusaders from an attack upon Egypt.³⁷

The Moslem rulers were perfectly willing to make large concessions. Of course they were greatly interested in the importation of arms and lumber, but they also found victuals, textiles, jewels, and other Western products most valuable, apart from manifold financial profits. Islamic doctrine, as has been seen, was no impediment to a grand-scale admission of Christians. We remember how in the dawn of antiquity Amasis of Egypt granted autonomous settlement to the Greeks. Now, the Italians were in a situation similar to that of the Greeks eighteen centuries earlier. One might conjecture that millennial tradition played a role in that medieval practice.

The agreements under discussion are ordinarily called "capitulations"³⁸—a misleading term explained by the fact that they were divided into numbered *capitula* (brief chapters). In most cases they took the form of a unilateral grant or franchise, which apparently appealed to the Moslem ruler's feeling of grandeur and generosity. Unilateral franchises were revocable—a point which, in later centuries, Western diplomats and jurists contested: it was a good thing to enjoy the advantages of unilaterality but not so good to be bothered with its reverse side. The question, however, was purely academic as the Moslem rulers were by that time too weak to experiment in revocation. In the eighteenth and nineteenth centuries the capitulations were gradually transformed into commercial treaties, but without entirely expunging the lack of reciprocity. That inequality was removed only in our century.

The capitulations bore witness to the skill of Western draftsmen. They tended to become more and more elaborate in the course of the centuries.³⁹ Their core was—in this respect the lack of reciprocity is particularly striking—the permission for citizens of the co-contract-

ing country to establish and maintain, under their own law and administration, a settlement in the territory of the Moslem ruler. (The Italian term *fondaco* may refer to the whole settlement, or to an isolated part of it, or to its main building.) The head of the settlement was called "consul" (or sometimes *vice comes*). Usually he was appointed by the home government (*consul missus*); a *consul electus*, chosen by the settlers—a rare case—had more limited authority. Generally, the consular powers, which could be delegated, were judicial as well as administrative. Consular jurisdiction encompassed litigation between citizens of the home country; sometimes it extended to litigation between Christians generally, and even to claims raised by a Moslem against a national of the consul. Claims against Moslems had invariably to be submitted to the local *cadi*. With certain exceptions, criminal proceedings against the co-nationals of the consul were included in his jurisdiction. In addition, he had diplomatic functions inasmuch as he enjoyed the right to appear from time to time before the Moslem ruler. On the other hand, he was long considered—at least by the Egyptian sultans—as a hostage for the good behavior of his countrymen.

Public worship of Christian faith was invariably granted to members of the settlements, and they were permitted to have their own graveyards. If a Christian died, the succession to his property would take place under his home law without any *droit d'aubaine* on the part of the Moslem ruler. The privileged status of foreigners extended into other fiscal fields. Numerous exceptions in their favor were provided with regard to the customary import taxes (10 per cent), export taxes (5 per cent), and sundry imposts. But there was much uncertainty on this score, for the remarkable reason that the legality of customs duties which are not mentioned in the Koran was subject to doubt.⁴⁰

Other typical features of the capitulations were the prohibition of reprisals, especially in the case of a foreigner's insolvency; the abolition of the law of shipwreck; and reciprocal promises of severe measures against pirates—who, nevertheless, remained the curse of Mediterranean commerce far beyond the Middle Ages. Custom was generally called upon to implement the rights and duties established under the capitulation. This created for the Europeans another opportunity to expand their position by representing as "custom" what could not be proved from the texts.⁴¹ Of course no similar rights were

accorded to the Moslem party in the European area. That lack of reciprocity, already referred to, is characteristic of the capitulations.⁴²

Agreements in many respects similar were concluded by the Italian city-states with the Christian states of the East—the Byzantine Empire, Lesser Armenia ⁴³ and the short-lived crusader states such as the Latin kingdom of Jerusalem. These agreements differed in character from the “capitulations,” according to the political factors involved, and were more varied. Privileges in the crusader territory were granted mainly as a reward for naval or other military aid in war, or as a means of obtaining such aid. The Venetians, with their tremendous naval might, sometimes nearly emasculated the local sovereignty by such agreements. In Constantinople and elsewhere they appointed “bailiffs”—political agents with an almost princely status and with functions far exceeding the consular ones; some resembled modern consuls general in being superior to the ordinary Venetian consuls.⁴⁴ The Christian rulers in the East generally granted autonomy to the subjects of the co-contracting city-state, though exemption from local jurisdiction was for the most part limited to litigation between such subjects. An interesting detail is presented by a privilege granted to Pisa in 1165 by Amaury (Almarich), Latin King of Jerusalem.⁴⁵ Amaury decreed that an area between the port and the city of Tyrus should be held open for all men of the world regardless of language or nationality. This sounds like an early profession of the “open door” principle. The motives behind the decree are not clear. In any event it remained isolated, and nothing is known regarding the effects of his apparent generosity.

While the “capitulations” and their all-Christian counterparts are matters of the past, their sequels still affect the international law of our day. The capitulations are the origin of the consular institution.⁴⁶ In medieval Italy the highest officials of cities or guilds, who had both judicial and nonjudicial functions, used the title “consul,” so august in antiquity. About the middle of the twelfth century, as the tasks of the city governments grew, consuls of a special type appeared—the mercantile consuls (*consules mercatorum*), heads of merchant guilds—first in Italian municipalities including Milan and Pisa and later in other Mediterranean trade centers, such as Narbonne and Barcelona. They exercised judicial jurisdiction over the members of their guilds and, on the basis of actual or presumed submission, over

foreigners, particularly in maritime cases. The mercantile consuls, then, were originally domestic officials; and it is to them that the name *Consolato del mare* refers. When autonomous Italian settlements were founded in Oriental countries it was only natural to extend the title to the heads of these settlements. Officials of the new "overseas" type soon came to be employed also between Western countries. As early as the thirteenth century consuls were sent, for instance, by Genoa to Spanish Seville, and by Marseilles to Genoa. This suggests the emergence of a new Western type of consul with a narrower range of functions.

Another feature of the modern consular institution may be traced to medieval custom. Consuls for Christian countries were sometimes chosen from citizens of the country of their mission (*consules hospites*, because they acted, so to speak, as hosts of the foreign merchants). High nobility and other factors of political prestige were the foremost qualifications for such office. In 1422 the Catalans made Cosimo de' Medici, who was to become the actual ruler of Florence and Pisa, their consul at Pisa. Similarly, in 1485, on the proposal of English merchants, Richard III conferred the same dignity upon Lorenzo Strozzi, a member of one of the most distinguished Florentine families. In the letter patent which created this, apparently first, royal "consulate" the king stated that he wanted his subjects in Pisa to submit to the decisions of the consul in whom he vested jurisdiction over Englishmen in Pisa.⁴⁷ Politically, the assignments of *consules hospites* might well have been machinations for ulterior political purposes; legally, they point to a rather restricted if not nominal authority of the appointees. Such consuls, forerunners of the modern "consuls elected," show a certain resemblance to the *proxenoi* of ancient Greece; but these were essentially diplomatic and informal in character, so that the comparison provides little elucidation. More important, the late Middle Ages confront us with the duality of consular institutions which came to its full height as late as the nineteenth century: the "judiciary" consuls of the Orient, conceived as heads of autonomous settlements, and the commercial consuls of the West.

The capitulations and other Mediterranean agreements have no counterpart in the North, but the far-flung activities of the Hansa resulted in remarkable compacts of Hanseatic cities with Russian princes.⁴⁸ We refer, in the first place, to the agreements between the

principality of Novgorod and Hanseatic cities, primarily Visby and Lübeck. As early as the twelfth century Hanseatic merchants had settled in Novgorod, the main Russian trading center with the West and for some time one of Russia's most important cities. They bought from the Russians mainly furs and wax, in exchange for clothes, wine, and salt. Attempts at securing a legally recognized position for the Hanseatics (called "Latin tongue" by the Russians because of their Catholic faith) started in the same century, and in 1259 led to a treaty with Novgorod. Nevertheless, commerce between Novgorod and the Hansa suffered again and again from serious acts of violence, and in 1385 the Hanseatic League ordered a trade boycott against Novgorod. This conflict was ended by the "Niebur Peace" of 1392, named after the Lübeck peace delegate. The peace was renewed and supplemented by various agreements in the fifteenth century.

A less important series of commercial conventions, spreading from the thirteenth to the fifteenth century, relates to the territory of the Dvina River. Riga, then German by population, was party on the Hanseatic side, while on the Russian side the princes of Smolensk, Polotsk, and Vitebsk were the signatories.

The main topics of the treaties were the protection of persons and their property at the market places and on the trade routes thereto, and the settlement of claims resulting from former acts of violence. In the treaty of 1259 Novgorod undertook in addition under certain conditions, a guaranty for damage which the German merchants might suffer on the Russian part of their route. Elaborate provisions, in the manner of pristine laws, fixed definite fines for killing, for various types of mutilation, for rape, etc. Self-help against persons, and reprisals of any kind, were forbidden. Special agreements tried to meet sharp or fraudulent practices. Thus, a treaty of 1442, negotiated on the Russian side by the Duke and the Archbishop of Novgorod in conjunction with prominent merchants, provided that wax sold to the Germans must not contain admixtures of fat, butter, acorn, or certain other inferior substitutes⁴⁰—an unusual type of treaty indeed. In the first Novgorod convention the Germans were allowed three *Höfe* (yards); and this was the entire treaty basis for the important Novgorod *Kontor*, which actually enjoyed full autonomy under Hanseatic law. Litigation between Germans and Russians was assigned to a mixed court presided over by the Duke of Novgorod, but this arrangement did not work out satisfactorily.

These German-Russian treaties are legally the most important West-East agreements in the medieval North. They invite comparison with the southern capitulations. It appears that the main theme of the northern compacts was suppression of violence and fraud. The whole atmosphere was one of utter distrust and hostility, particularly on the side of the Russians, who looked upon the Germans as intruders.⁵⁰ In contrast, the Mediterranean agreements exhibited, relatively speaking, an atmosphere of courtesy and generosity. It is true that the German-Russian conventions were built upon reciprocity. Nevertheless, the impression remains that the Mediterranean treaties represent a higher state of civilization.

CHAPTER IV

Modern Times, Until the Thirty Years' War

BASIC FACTORS, WEST AND EAST

"Modern times" begin customarily with 1492, the year of the discovery of America. Certainly this event, and the Reformation, are the major signposts of the new era. Their influence upon international law was great and manifold.¹ But the growth of international law in the new era must be attributed, in the first place, to the rise of national states, especially of Spain, England, and France. That rise was a protracted process which matured in the early stages of modern times. Not only did feudal law vanish from the international sphere, but politically the position of the city-states and other small communities became for the most part untenable. Even where, as in Italy, the formation of a national state did not occur, the city-states widely succumbed to the process of territorial consolidation. In the North the Hanseatic League suffered a similar fate. As a result, the participants in international transactions decreased in number. It is true, members of the Holy Roman Empire, as was mentioned, would sometimes conclude compacts of an international character; and their inclination to do so increased in the new era. But legally they remained subject to imperial power (and, of course, holders of constitutional rights in the Empire).

The centrifugal trend within the Empire was greatly enhanced by the Religious Peace of Augsburg (1555) which secured to the Lutheran princes and cities full equality with the Catholic princes, including the right to determine, within their respective territories, the religion of the inhabitants (*cujus regio, ejus religio*). Furthermore, and independently of this development, Switzerland, in 1499, dissociated herself to all intents and purposes from the Empire through the Peace of Basel.² This dissociation was the result of a long struggle between Switzerland and Austria, whose archdukes were at the same time German emperors. Although even after 1499 the Swiss some-

times behaved as members of the Empire and obtained legal recognition of their independence only by the Peace of Westphalia (1648), Switzerland was considered as a sovereign state from the year 1499.³ In order to protect her independence Switzerland in this period, and more definitely in the one following, gradually developed her policy of neutrality not yet formally declared.⁴ The coexistence of both Protestant and Catholic cantons proved, despite grave conflicts, an effective antidote to tendencies to join one or the other belligerent group. The same division permitted Switzerland to abide by her practice of allowing foreign powers to hire Swiss mercenaries; Protestant as well as Catholic countries profited from it. Officially the practice of mercenary service was limited to "defensive" purposes; but this was only a weak palliation.

An even more important newcomer among the independent powers was the Netherlands. Subject to Burgundian rule, her bond with the Empire had long been very loose—in fact it required a celebrated war to wrest her independence from the Spanish kings, successors to the Burgundian rulers. The Union of Utrecht (1579) is generally considered as the beginning of the new state, though the war with Spain continued for decades and international recognition of the Netherlands' independence was established, like that of Switzerland, only by the Peace of Westphalia. Still, from the early seventeenth century on, the Netherlands was a power in the commercial, naval, and colonial fields. Her great achievements extended from the arts and sciences to international law, as will be seen.

Among the European nations, however, the hegemony fell to Spain. With the conquest of Granada (1492), Spain became a unified kingdom; and the discovery of America immensely enlarged its possessions and riches. Spain expanded in Europe too, reaching the height of her powers under Philip II (1556–1598), who ruled also over Sardinia, Naples, Sicily, and, after 1580, Portugal. This was Spain's "golden age," politically as well as spiritually.

Spain had won her unity as the result of centuries of bitter fighting, in the name of Christianity, against the infidels. During that struggle a tradition was established which, together with Spanish fierceness and pride, determined the character of Spanish political and legal philosophy. The great legislative work of Alfonso X, *Las Siete Partidas* (The Seven Parts), perfected in 1263, was heavily imbued with ecclesiastical notions⁵ and opened the doors wide to ecclesiastical juris-

diction over the laity.⁶ In the sixteenth and following centuries the orthodox Catholic tradition persisted and was intensified. In domestic politics, the Holy Inquisition, with its all-pervading and cruel persecution of heresy, became the dominant power; and in Spain more than in any other Catholic country it molded the spiritual and political course of the country. The same spirit prevailed in Spain's foreign policy, which, through the stern fanaticism of Philip II, created intense tension and hostility over all Europe. Religious ardor, along the lines of orthodox Catholicism, also colored Spanish thought and art.

Legal repercussions of the discovery of America appeared first on the supranational, rather than the international, plane. In 1493 Pope Alexander VI of the House of Borgia conferred upon the Spanish sovereign, by the Bull *Inter caetera*, the Indian (American) isles and mainland westward of a line running one hundred leagues to the west of the Cape Verde Islands.⁷ There had been, we know, precedents for papal grants of this type, but the Holy See's plenitude of power over the whole earth had never been set forth in such challenging terms as was done by this most unworthy incumbent of the Holy See. If not an outright donation of those far lands, it was the establishment of feudal vassalage under the overlordship of the Pope—a conception which cannot be denied grandeur. On the basis of the papal demarcation, though without express reference to it, Spain and Portugal agreed on the distribution of the countries newly discovered or yet to be discovered. The first agreement, the Treaty of Tordesillas of 1494, placed the demarcation line 270 leagues farther west. The second was the Treaty of Saragossa between Charles V of Spain and John III of Portugal, made in 1529. It is remarkable that the clause in the Treaty of Tordesillas against papal dispensation⁸ was elaborated in 1529 by these faithful Catholic rulers so as to prevent the use of a dispensation which the Pope might grant on his own initiative (*motu proprio*). Despite the solemnities observed, the Treaty of Saragossa was violated by Spain in 1542–1543, when a Spanish expedition, over the valid protest of the Portuguese, occupied the islands now known, in tribute to the Spanish king, as the Philippines. The ensuing controversy was settled only in 1750 by a Spanish-Portuguese treaty.

In the East the place of the Byzantine Empire was now occupied by the far more powerful Ottoman Sultanate, which, under Suleiman

the Magnificent (1520–1566) became a formidable menace to Christianity, and especially to the Holy Roman Empire (siege of Vienna, 1529). Nevertheless, Suleiman in 1535 established a legal bond with the West which was to have great and lasting effects, by concluding a “capitulation” with Francis I of France.⁹ This document was a real treaty, and a treaty made for the lifetime of the two rulers rather than for a definite number of years. Also, it was far more comprehensive than its medieval predecessors. Freedom of sojourn, of commerce, and of navigation was made reciprocal—an arrangement, it is true, of little practical value to the Turks. At the same time the Sultan granted one-sided concessions on an extraordinary scale. Turkish jurisdiction was not only eliminated from disputes among Frenchmen, but was heavily restricted in disputes between a Frenchman and a subject of the Sultan. The French King was authorized to appoint consuls with jurisdictional power in any part of the Turkish Empire; and Turkish officials were ordered to enforce the decisions of the local French officials. Frenchmen in Turkey were freed from forced labor; they received important privileges in taxation; reprisals against them were forbidden, etc.

While the convention was ostensibly phrased like a commercial agreement it was political in its implications and actual effects, aimed as it was against Charles V, Emperor of Germany and King of Spain, the common adversary of the contracting sovereigns. The treaty therefore violated papal prohibition as well as public opinion in Christendom.¹⁰ Naïvely, and rather as a sign of bad conscience, the convention contains an invitation to “His Holiness the Pope” and to the kings of England and Scotland (of course not of Spain) to join it. Moreover, the French King tried to justify his attitude by a letter to the Pope in which he pointed to the unity of mankind, Christian and non-Christian.

It is surprising that the ruler of the Ottoman Empire, then at the height of his power, should have made such unusual concessions to the French King who was vanquished by Charles V and was then in utter distress. Suleiman could hardly expect, and actually did not obtain, much help from the King. To some extent the tradition created by the medieval capitulations, as well as the lenient religious notions of Islam, seems to have been a factor in his policy. But, like other Moslem rulers, he probably was influenced by a bent toward majestic generosity. In line with this attitude he also proved himself more

faithful than the French King to his treaty obligations.¹¹ The Moslems, whatever their cunning, were no match for Western diplomacy.

In the light of world history the treaty of 1535 marks the beginning of a policy by which France refused to identify herself with the wishes of the Holy See to the same extent as, for instance, Spain or Austria. Still, the amazing result was that France emerged as a leader and protector of Catholicism in the Levant. The norms of the capitulation of 1535 were strengthened and expanded by custom and by later capitulations (1569, 1581, 1597, 1604) which fell back on the form of unilateral grants. Moreover, non-French Christians developed a habit, tolerated by the Turks, of placing themselves under French protection, and especially of navigating, with French consent, under the French flag. Thus "Frank" became, among Moslems, a current term for a European Christian. The capitulation of 1581 accorded to the French ambassador precedence over the ambassadors of other powers; that of 1604—expanding grants by Suleiman the Magnificent—conferred upon France custody over the Holy Places of Palestine as well as protection of Catholic pilgrims.¹²

However, the French monopoly (though not French primacy) was broken in 1583, when England obtained from the Sultan a capitulation which extended to England, the same privileges, on the whole, as were enjoyed by France.¹³ The English flag could now be openly displayed in Turkish waters. The Dutch, previously compelled to sail under the French flag, hoisted that of the English, until in 1612 they succeeded in obtaining a capitulation which allowed them the use of their own colors. All this happened over the fierce opposition of France. Catholic-Protestant antagonism played a role; but in the first place it was commercial and political interests which motivated the rivalry of the European powers in the Turkish area.

Europeans visited the Far East quite extensively in this period. Still, in comparison with the Near East, very little can be told about international agreements affecting the Far East. In China attempts at Christian penetration soon came to naught. Only the Portuguese succeeded in 1557 in establishing at Macao a settlement which, under a high degree of self-government, proved to be a great and lasting success.¹⁴ In the eyes of the Chinese the settlement was based merely on their toleration; and they repeatedly asserted their sovereignty and

jurisdiction over Macao. A Chinese-Portuguese treaty was not concluded until the nineteenth century.

In Japan the development was different.¹⁵ Japan generously opened her doors to the Europeans, and especially to the Spanish Jesuits. Through great ability and devotion the latter succeeded in converting numerous Japanese to the Catholic faith; but gradually the Japanese became convinced that Christianization would lead, as in the Philippines, to colonization under the Spanish crown and to the eventual destruction of Japan's independence. A sharp reaction followed at the beginning of the seventeenth century. Within a few decades Christianity was practically exterminated in Japan. For more than two centuries thereafter, Japan followed a policy of seclusion stricter even than the Chinese. There was only one exception, and that in terms of international law. In 1611, when the Shogun undertook decisive steps to banish the Christians from his court, he concluded a limited treaty of commerce with the Dutch, from whom he did not expect much political and religious ambition. They were first allowed to have a factory at Hirado. Their privileges were later curtailed, and they were enjoined from public exhibition of their religion. The latter fact served Spinoza to demonstrate the sovereign's territorial supremacy in religious matters.¹⁶ The agreement of 1611 remained in force until 1856, when a modern treaty of commerce was agreed upon between Japan and the Netherlands.

STATE PRACTICE

In state practice the effects of the great religious strife engendered by the Reformation are visible everywhere. The Catholic doctrine requiring extermination of heresy by any available means was carried out with stern fanaticism and consistency by Philip II of Spain and his men. In the international area the assassination, officially solicited and rewarded, of William the Silent of the Netherlands, and the attempted assassination of the excommunicated Queen Elizabeth are outstanding examples. The English, main champions of the Protestant cause, retaliated not in kind but by highly successful marauding expeditions against Spanish ships and possessions in peace time. Outstanding among the buccaneers who conducted these were Sir Francis Drake and Sir John Hawkins ¹⁷ (Hawkins also cultivated the profitable

slave trade). It can hardly be denied that some of their acts amounted to piracy, despite toleration and rewards by their government.

This is not to say that international law disappeared in the period. Its secular character became now more pronounced through the weakening of ecclesiastical law. The popes, it is true, would still grant secular titles to Catholic princes. Thus, Pope Pius V in 1567 made Cosimo de' Medici Grand Duke of Tuscany, and the grant was confirmed nine years later by the Emperor. On the other hand, no papal power over new lands was recognized after the beginning of the sixteenth century. The issue was to be decided on secular grounds. Sometimes discovery alone was held sufficient to confer a valid title to sovereignty; but, on the whole, the rule came to prevail that it was necessary to take possession of the discovered territory. The "possession" requirement was borrowed from Roman law, where it related, however, to individual pieces of movable or immovable property. It needed recasting in order to be applicable to vast territories. Often "symbolic" acts performed in the territory, such as the erection of crosses or of monuments bearing the arms of the conquering sovereign, were held sufficient;¹⁸ but this theory, too, was open to serious objections. "Agreements" with native chieftains were sometimes added as a part of the occupation ceremonies, but they had only a decorative significance.

In the field of treaty law, ecclesiastical influence, so powerful in the Middle Ages, disappeared gradually in the period. In 1526 Francis I of France received the Church's official blessing when he declared invalid, as made under duress, the Peace of Madrid concluded under oath with Charles V;¹⁹ and in 1535 Pope Paul III restated, with a view to Henry VIII, that treaties with heretics were illicit and invalid.²⁰ However, in the later part of the sixteenth century and thenceforth, ecclesiastical interference with treaties fell more or less in desuetude. A lasting influence of canon law may be seen in the introduction of the *clausula rebus sic stantibus* into international law,²¹ but the *clausula* had now become a secular affair. The custom of confirming important treaties by oath under invocation of the Holy Trinity persisted, though the more circumstantial forms of the past became obsolete.

For commercial conventions the era was not favorable. Even the efficacy of existent treaties was jeopardized by the unrest of the time.²² The rising absolutism at least tended to diminish the difficulties originating in the coexistence of state taxes and of inland customs levied

by cities or other autonomous political entities. In this respect a new avenue was opened by a Franco-English treaty of 1606 "for the safety and liberty of commerce"; namely, among the subjects of the French and English sovereigns. This treaty provided for the placarding of tariffs by both governments and for restrictions on inland imposts.²³

The confused situation regarding piracy has already been referred to. Still the fight of the law against that plague assumed more definite forms in this period. In 1536 power was granted to the English Courts of Admiralty to inflict the death penalty upon persons committing crimes on the high seas.²⁴ France followed in 1584.²⁵ Gentili, in 1598, declared piracy to be a violation of the law of nations against which war should be made by all means.²⁶ As a pertinent international agreement one might mention the arrangement of 1517 between France and England to establish special courts for hearing complaints about crimes committed at sea;²⁷ but apparently it has not become effective. The French-Ottoman capitulation of 1535 provided stringent measures against pirates—a fact noteworthy because of the opinion prevailing on both sides, that ships of infidels were good prize. Again, we know nothing about the actual execution of those measures. Piracy persisted in the Mediterranean on a grand scale.

The law regarding diplomatic envoys presents, in this period, one most stirring and momentous event. In 1584 the English government was confronted with the case of the Spanish ambassador Mendoza, one of the principals in a plot to dethrone and kill Queen Elizabeth and to liberate the Catholic Queen Mary of Scotland. Gentili and other scholars versed in Roman law were asked to give their opinions. They held that Mendoza was protected by his immunity as an ambassador, and could not be put to trial in an English court. The government followed this advice, and expelled Mendoza rather than bring him to trial as excited public opinion demanded.²⁸ We shall have to consider later the doctrinal implications of this event.

Permanent ambassadors became more frequent in the period; but, characteristically enough, their establishment often required special treaties. Such an agreement was concluded in 1520 between Emperor Charles V and King Henry VIII of England.²⁹ Toward the end of the period permanent ambassadors were in general use among the greater powers, though Grotius, writing in 1624, still considered them unnecessary.

In the vast field of warfare a slight progress of law is observable; however, that law was not international but municipal and military. The elaboration of written military rules for the maintenance of strict discipline and order was bound to serve the cause of humaneness to some extent. The first vestiges of such military ordinances can be found in the last centuries of the Middle Ages,³⁰ but greater advancement was achieved only in modern times. Thus, imperial ordinances issued in 1570³¹ prohibited pillaging without permission of the military superiors and required orderly sale of booty lawfully obtained. Protection of women and old people was another aspect of military regulation. However, the conception that a soldier may seek his own profit in warfare still prevailed; booty and ransom were his except where ransom was reserved to the king. In France ransoming of important captives developed into a kind of financial institution with legal questions decided by a court (*tribunal de la Connétablie*), especially in connection with the guarantees often undertaken for the payment of ransom.³²

Maritime war was conducted largely by "privateers," ships authorized by a belligerent prince to take enemy property for the privateer's profit.³³ The authorizing document came to be called "letter of marque" (seizure) or "letter of marque and reprisal." Privateering differed from reprisals, however, in that it did not serve the prosecution of alleged rights. Being officially engaged in war, the privateers were not pirates in the proper sense; but actually there was not much difference, and the whole institution soon became the object of violent denunciation from all quarters. Still, it should be mentioned that in the sixteenth century they fulfilled a historically important function when, in the fight for the freedom of the Netherlands against Spain, William the Silent as sovereign Prince of Orange gave letters of marque to a number of Dutch vessels. These "Beggars of the Sea," as they were called, did great harm to the Spaniards, but otherwise fully lived up to the bad reputation of the privateers. (Incidentally, Orange, a small principality in southern France and far from the sea, had nothing to do with the war.)

The law of neutrality was also rather obscure in this period.³⁴ While the terms *neuter* and *neutralitas*, indicating nonparticipation in war, occurred here and there in the last centuries of the Middle Ages, they assumed definite legal significance for the first time in

treaties concluded in 1492 by the principality of Liège with France and the Netherlands, then at war with each other.³⁶ Liège, having declared her intention not to aid either one of the belligerents, was guaranteed against invasion or any other warlike measure. In this case neutrality was formulated as permanent, though actually it lasted no longer than twenty-six years. Generally, the neutrality of any country remained a matter of treaty, being bestowed by powerful belligerents upon a nonbelligerent. In the absence of such an agreement belligerents were held entitled to transport troops and supplies across a nonbelligerent country and to levy mercenaries there, a practice explained by the weakness of so many potentates and by the dispersed condition of numerous territories, brought under the same rule by inheritance, marriage, and other arrangements. The neutrality treaties varied too greatly to constitute a well defined type. The most important example is the Neutrality Treaty of Mayence, concluded in 1632 between Gustavus Adolphus of Sweden and the Catholic German states, which were then in an unfavorable military situation. Swiss neutrality was not yet a formalized rule, as has been pointed out.

In maritime warfare the legal position of the neutrals was not much better.³⁶ In 1543 a French maritime ordinance decreed that any ship carrying enemy goods would be considered good prize, together with its cargo ("enemy goods, enemy ships"), and that condemnation of enemy ships would extend to their neutral cargo ("enemy ship, enemy goods"). The second rule had been employed by England in the fifteenth century; now the harsher first rule was also accepted by England, though not, for instance, by Spain. Relaxation of the rule was granted to Venice and other Italian city-states by way of special arrangements. Progress of greater significance was achieved in the procedural field. Political considerations made it more and more advisable to grant the neutral claimants of captured ships and goods at least the guarantee of a fair trial. During the last centuries of the Middle Ages, England developed the practice of deciding disputes on prizes according to legal principles.³⁷ The king, originally the sole authority in matters of naval warfare or piracy, delegated his power regarding prizes to the admiral or his deputy, a jurist. But it was only in the second decade of the sixteenth century that the High Court of Admiralty, which proceeded without jury, was made a Court of Prizes, "legal in character and atmosphere." The law of admiralty,

which included elements of what today we call international law, supplied the basis of the Court's proceedings. In other countries the admirals remained competent for decisions on prizes. France followed the English example by establishing a Conseil des Prises, but this happened as late as 1659.³⁸

DOCTRINAL DEVELOPMENTS

The chasm of the Western world, which was the result of the Reformation, was bound to affect the doctrine of the law of nations. On the Catholic side, Spain was preeminent during the sixteenth and the early seventeenth centuries. While lagging in the natural sciences, she rose to great heights in theology and jurisprudence along the lines of scholastic tradition. The most orthodox type of Catholic thought formed the dominant feature of this development.³⁹ Momentous factors of political history and national psychology, referred to above, worked together in imparting to the Catholic idea in Spain a unity and strength found nowhere else in the Christian world. To the Spanish thinkers, the political picture of the world was theocratic in terms of papal paramountcy. Such powerful opponents of papal supremacy⁴⁰ as Occam and Wycliffe in England, Marsilius of Padua in Italy, John of Paris in France, and Leopold von Bebenburg in Germany had never appeared in Spain. Hence there was in Spain perfect agreement among the learned that the Pope, in the interest of the Catholic faith, had power to depose kings and install new ones, to release subjects from their allegiance to their princes, to dispense with oaths and promises, private and public, to assume *ex officio* the decision of disputes between temporal rulers, etc. In the interest of the Church, the Pope had authority to take similar measures even against infidel princes.⁴¹ He could delegate his powers⁴² or grant monopolies for evangelization and trade.⁴³ There was high authority for the thesis that Christians, by majority vote, might unite the whole world into one state, and must do so on the demand of the Church.⁴⁴

All this amounts to an elaboration and systematization of medieval thought. Papacy and the Empire were, just as in the Middle Ages, the dominant conceptions of the Spanish school, at least in its earlier phase. Within this framework the role of "princes" was now defined. Secular writers had recognized cities as legal entities even in the Middle Ages,⁴⁵ but the conception of state remained dim until

the seventeenth century and beyond.⁴⁶ Such terms as *respublica* and *civitas* referred to the citizenry as distinguished from or opposed to the prince.⁴⁷ Still less could the medieval and Spanish scholastics possess the concept of sovereignty.⁴⁸ This notion, as will be seen, originated in the late sixteenth century with Bodin, a writer very remote from theological or scholastic thought,⁴⁹ to grow into a concept of international law long afterwards. Meanwhile, political and legal writers had yet to become conscious of the new type of state and to gain sufficient knowledge of its slowly evolving diplomatic and legal relations. In the flourishing period of the Spanish school the time was not yet ripe for a modern conception of international law.⁵⁰

The inadequacy of the scholastic system is high-lighted by the just-war doctrine. That doctrine in itself was, we know, by no means "international" in origin. It was a very broad conception of moral theology and was so maintained by the Spanish school. This meant that ultimately it would be for ecclesiastical authorities to decide whether or not a war was or was not "just"—a result inconsistent with the legal-political idea of sovereignty.⁵¹

Another aspect of the just-war doctrine was even more in conflict with modern conceptions. According to the scholastics a war could be "just" only on one side. Justness derived from divine natural law was one and indivisible. Hence the recognized limits of warfare—especially the prohibition against the killing of prisoners—would protect only the fighters for the just cause. In historical perspective one might concede that in the era of "private" wars the threat of such stern consequences of unjustness could have been a deterrent to aggression; but this idea was out of place when national states and national wars made their appearance. The resulting danger of utter brutality and murder was all the greater because each party would be particularly inclined to consider its cause as the just one where national pride was a factor. The leading Spanish authors were more or less aware of the dangerousness of their tenet; but, because on religious grounds they found it impossible to abandon the fundamental premise, they tried to restrict its evil consequences by artificial and inadequate explanations and limitations, the main instances of which will be discussed later. In reality, full equality of the belligerent parties, with no regard for religion or moral motivation, was required by sound legal theory, and this solution could be reached only on a secular basis.

It is important to know that the just-war doctrine was by no means a secondary feature of Spanish scholastic thought in our field; quite the contrary, it was its central point. The Spaniards contemplated the relations among princes only from the viewpoint of war; on such peaceful institutions as embassies or treaties they had very little to say.⁵² To these shortcomings one must add the religious fanaticism widely exhibited by the Spanish authors. Despite the treaty of Francis I with Suleiman the Magnificent, they still considered the Saracens *per se* as born enemies of Christianity, necessarily on the "unjust" side. And the Dominican Domingo de Soto—often mentioned as one of the initiators of international law—declared as late as 1556, with characteristic casualness, that heretics were to be burned.⁵³ Kindred views usually prevailed in the Spanish wars against the Netherlands.⁵⁴

Not only such extremist views and actions but the whole theocratic Spanish system was an impediment rather than an aid to the development of a modern doctrine of international law. The main merits of the Spanish school are found in fields other than international law, and first of all in its efforts to humanize the methods of colonization.⁵⁵ But the Spaniards did contribute to the genesis of modern international law to a certain extent. The most enlightened among them approached a secular view in some respects. Together with contemporaneous thinkers of other nations they belong to the predecessors of Grotius,⁵⁶ though even among those predecessors the Anglicized Italian Gentili came nearer the goal. Nevertheless, they all remained far behind Grotius who, as will be seen, presented for the first time a far-flung system of international law acceptable to all states.

The greatest among the Spanish scholastics were the Dominican Francisco de Vitoria and the Jesuit Francisco Suárez.⁵⁷ Both were versed also in the law—theology and legal science were then closely associated, with theology in the lead. Characteristically, Spain's most distinguished jurist of the period, prominent in canon as well as in civil law, was Diego Covarruvias, Bishop of Segovia, called the Spanish Bartolus.⁵⁸ The secular Spanish jurists were of lesser stature. They, too, worked along the line of scholasticism and in spiritual conformity with the theologians. We shall have more to say about one of them, Balthasar Ayala. The others are of only slight importance in the history of international law.⁵⁹

The accomplishments of the Spanish school were generally overlooked in historical accounts of international law until the beginning

of the present century, in Protestant as well as Catholic countries.⁶⁰ The explanation must be sought in the prevailing theological character of the Spanish doctrine. The detection of the oversight,⁶¹ however, was followed by a reaction which far overshot the mark. The Spanish scholastics, and first of all Vitoria and Suárez, came to be represented as the true founders of international law, with Grotius and his followers as their disciples. This view has been widely spread by a biased but influential literature which is primarily connected with the name of an American, James Brown Scott. The implications of the problem and the challenging features of the literature involved make it desirable to devote an appendix of the present book to a special inquiry into this subject.⁶²

A line of thought entirely different from that taken by the Spanish school developed a few decades later in England. We have noticed the remarkable action of the English government in the Mendoza case. That action was based on the idea that Roman law was a proper tool for ascertaining rights and duties in international relations. The same view had been indicated by Queen Elizabeth in 1580, when Mendoza made representations on Drake's actions in the West Indies. Her answer rejected the Spanish claims, using arguments clearly taken from Roman law;⁶³ and in 1609 her successor, James I, addressing the Parliament, declared the knowledge of Roman law most necessary for intercourse with foreign nations.⁶⁴ Application of Roman law to those relations is conspicuous in the writings of Gentili, an Anglicized Italian of the sixteenth century, as we shall see later in this chapter; English jurists of the seventeenth century stressed the usefulness of Roman law in the regulation of foreign affairs even more emphatically.⁶⁵ As a matter of fact, Roman law has been considered in England, more than in other countries, as helpful, by analogy or otherwise, in international law cases almost to the present day.⁶⁶

It is easy to understand why in the sixteenth and seventeenth centuries the English resorted to Roman law in international situations. The law had early become of paramount concern to English thought. Still one could not possibly invoke the domestic common law toward foreigners;⁶⁷ Roman law, however, was respected all over Europe, Catholic and Protestant. In the case of Spain, Roman law was invariably referred to by her theologians and jurists, and it had legal force in some parts of the country.⁶⁸ There was for the English no

better way of talking juridically to foreign powers than in terms of Roman law.

At the same time, reliance on Roman law meant the secularization of legal relations among states, in contrast to the conceptions of the Spanish theologians or, one may add, to the teachings of Moslem scholars. Though the English of the sixteenth and seventeenth centuries did not evince the erudition and analytical acumen of the Spaniards, their basic approach was more in accord with the objectives and the trend of international law. Thus the law of nations became the domain of the English "civil law" jurists, together with the matrimonial law (because of the Roman elements of canon law) and the Law Merchant, which in this period actually led to English recognition of foreign judgments, especially in the maritime sphere.⁶⁹

References to Roman law are sometimes found also in the diplomatic history of countries other than England.⁷⁰

It may be mentioned that juridical tractates on the law of nature and of nations were widespread during the period, especially in Germany; but they were devoted to general jurisprudence and had little bearing upon the subject of our inquiry.⁷¹

In private international law, the center of scholarly efforts had shifted during the fifteenth century from Italy to France, where the diversity of local customs led increasingly to "conflicts of laws."⁷² In the sixteenth century the humanist movement, which nowhere more than in France had taken hold of legal science, replacing the scholastic method by historical and critical inquiry, made its appearance in private international law under the leadership of the Breton nobleman D'Argentré (Argentraeus, 1519-1590). Though applying progressive methods, Argentraeus stuck to the political principles of dying feudalism. He was guided by the idea of placing property rights, on the largest scale, under the exclusive control of local customs, which were then feudal in character. In this he was opposed by Carolus Molinaeus (Charles Dumoulin, 1500-1556), one of the greatest jurists of all time, who, though leaning somewhat on scholastic methods, was the first writer to proclaim the rights of the parties to choose for themselves, within certain limits, the territorial law governing their legal relations. He applied this idea especially to marital settlements, pointing out that such settlement, if made, for example, in Paris, should be supposed to have been placed under Paris law by the tacit intent

of the parties; a theory eliminating to this extent the feudal customs of the seigniories in which the property, object of the settlement, was situated. It was only in the nineteenth century that this notion of the "autonomy of the parties" (namely, the autonomy of determining the law applicable to a legal relation of theirs) displayed its far-reaching implications; but its rise in the sixteenth century indicated a new emphasis upon the potency of the individual will. Perhaps it is not a mere coincidence that its originator, Molinaeus, was a Protestant.

In conclusion, let us glance at the political theory of the period and at contemporaneous plans for perpetual peace. On political theory we must content ourselves with mentioning two great political thinkers whose tenets had indirect bearings on the law of nations: Niccolo Machiavelli (1469–1527) and Jean Bodin (1530–1596).⁷³ Both Machiavelli's and Bodin's works are related to the rise of national states. Machiavelli, the Italian, famous through his books *The Prince* and *Discourses on the First Decade of Titus Livius* (both 1513), found his country divided, misruled, and corrupt, an easy prey to foreign powers and mercenaries. Italy's political unity being his ideal, he felt that progress could be attained only by a ruler who would concentrate upon the aggrandizement of his realm by the most ruthless use of all serviceable means, including deceit and murder. Machiavelli, however, did not propound anything like a systematic theory. The so-called doctrine of *raison d'état* is implicit in his narratives and comments, but is not presented in abstract propositions. The idea is that everything depends on the particular circumstances with which a ruler is faced. This applies particularly to the keeping of promises—a point where Machiavelli came nearer to international law than anywhere else. While his attitude in the matter was cynical, he was not unaware of the fact that keeping one's promises has its value politically.⁷⁴ The view he seems to favor is practically not far apart from the doctrine of *clausula rebus sic stantibus*. Of course his notions conflicted sharply with scholastic teachings which purported to subordinate the whole province of politics and especially the relations among rulers to the demands of moral theology. At the same time Machiavelli, on political grounds, was a bitter enemy of Church and papacy, upon which he laid the blame for Italy's desperate situation.

To this extent his teaching added to the undermining of medieval universalism.

On the other hand France, in the day of the Frenchman Jean Bodin, had already become a unified kingdom. Yet she was torn and paralyzed by inner dissension. Bodin's *Six livres de la république* (1576)—"republic" here means State—set forth a general theory of the State, conceived with an eye to France and prompted by the desire to strengthen and improve the government of the country. From this national viewpoint he developed his famous theory of sovereignty which, in the paramount case of a monarchy, is vested in the person of the monarch. Sovereignty is presented by Bodin as the absolute and perpetual power over the people, unrestrained by human law.⁷⁵ Such a power, he asserts, will be the proper instrumentality for attaining a well-ordered state. Applied to France, the doctrine of sovereignty turns particularly against imperial and papal supremacy, against religious factions, and, despite some reservations, against the estates which restricted royal authority. Bodin considered as the mark or indication of sovereignty the presence in the ruler of definite prerogatives, especially the legislative power, the power over war and peace, and the supreme judicial power (*jus de non appellando*), to which the term of sovereignty had previously been applied. This approach quite naturally led to the establishment of a hierarchy of potentates. Bodin's theory of sovereignty as well as his classification of rulers was bound to have repercussions upon the doctrine of international law. In fact the notion of the ruler's sovereignty became a cornerstone in the secular structure of international law.

Projects for securing perpetual peace through political reconstruction had been barred in the sixteenth century by religious passions, but emerged anew in the seventeenth century. In 1623 a Paris writer, Emeric Crucé, published such a project in a pamphlet entitled *Le Nouveau Cynée; ou, Discours d'état représentant les occasions et moyens d'établir une paix générale*.⁷⁶ (Cynée, or rather Cyneas, is an ancient character said to have argued against war.) The pamphlet—another reaction against the horrors of the Thirty Years' War—is an attempt to persuade princes by diverse arguments of the absurdity and wickedness of war. Rather secondarily, the author turns to the question of how universal peace may be se-

cured by external means. In this connection he recommends that the princes maintain somewhere, perhaps at Venice, a permanent assembly of ambassadors which would sit as a kind of court to decide "without passion" disputes between member princes. Republics would have no vote, but the great republics must be consulted. Crucé is much concerned with questions of precedence; pointing to the military valor of Frenchmen, he grants France precedence not only over England but over mighty Spain. The sketchy project, which even in Crucé's time was not taken too seriously, soon fell into oblivion. Unearthed at the end of the nineteenth century it was undeservedly given an exalted place in the literature of international relations by pacifist writers.

A more interesting scheme of European political organization is found in the memoirs of the Duke of Sully (1560-1638), Minister of Henry IV of France.⁷⁷ Sully, who, after the King's assassination (1610), had to abandon the service of his country, wrote the memoirs in the involuntary leisure of his age. They contained as a high point the so-called Grand Design, which he ascribed to Henry IV in order to give it a higher prestige. The Grand Design called for a European federation on the basis of a redistribution of European territory. There should be fifteen states; namely, six hereditary monarchies (France, Spain, Great Britain, Denmark, Sweden, and Lombardy), six elective monarchs (the Pope, the Emperor, the Duke of Venice, the kings of Hungary, Bohemia, and Poland), and the three republics of Switzerland, the Low Countries, and a proposed Italian republican state. The federation would operate through a General Council with supreme political and judicial functions, and through six provincial councils. The crucial point of the scheme was a weakening of Austria and Spain, then both under the Hapsburgs, and both France's adversaries. They would not only forgo their prominent position through the egalitarian structure of the federation, but also lose important territories; for instance, Spanish Belgium would fall to the United Provinces of the Netherlands, the Tyrol to Switzerland, and so on. A Europe so reconstructed would be able to expel the Turks from its territory; Sully even gives details on the contingents to be furnished by the various states for the Turkish war.

It is difficult to understand how Sully himself could have considered all this as anything but a wishful dream, a playing with thoughts. Of course, even in the dreams of a person who had long

been the leading statesman of a great country, one may find significant notions. Thus, his proposal to reduce Spanish as well as imperial Austrian power was consonant with the actual historical trend, as was evident, soon after Sully's death, in the Peace of Westphalia. Besides, the memoirs of a great statesman will invariably meet with some degree of lasting interest. Hence Sully's Grand Design was well known to subsequent writers in the field.

FRANCISCO VITORIA

Among the writers related to the history of the law of nations, the Spanish Dominican Francisco Vitoria (1480-1546), Professor of Theology at the University of Salamanca, has already been mentioned as a most distinguished figure.⁷⁸ He himself did not publish anything. Among posthumous publications of his works, some lectures are outstanding. They are preserved in elaborate notes of his disciples, partly dictated by Vitoria. From the viewpoint of the law of nations the interrelated lectures on "The Indians Recently Discovered" and "The Law of War Made by the Spaniards on the Barbarians,"⁷⁹ given in 1532, are paramount. As the titles indicate, the lectures dealt with the Spanish conquest of America. The Dominicans were particularly interested in this matter since immediately after Columbus' discovery their Order, following its old missionary tradition, had embarked upon the evangelization of the American Indians. Bartholomew de las Casas (1474-1566), the "Father of the Indians," is prominent among the Dominicans who sailed to America. It is recorded in the annals of history how this great and noble man, inspired by the highest principles of Christianity, devoted himself to the defense of the Indians against the ruthless exploitation and ferocious cruelty which they had to suffer from the Spanish conquerors.⁸⁰ Whether there were any personal relations between Las Casas and Vitoria we do not know, except that in a politico-theological controversy between Las Casas and his Spanish adversaries, Vitoria, on the request of Charles V, rendered an opinion that was favorable to Las Casas. In any case there was a clear kinship of spirit between these two Dominicans. Yet their approach to the American Indian problem was different. Though an eminent scholar, Las Casas was a missionary, the pastor of his flock. Vitoria was a professor; he attacked the problem from a theoretical viewpoint. Inspired by the teaching of Thomas

Aquinas, who had also been a Dominican, he undertook a systematic inquiry into whether the war of the Spaniards against the Indian aborigines was or was not "just." Examining one after another of the various reasons advanced by ecclesiastical or secular authorities and by writers, Vitoria rejected many but finally approved some of them. In their discussion he nearly always followed the line of enlightened humaneness. He also exhibited political courage. Although Emperor Charles V was then his sovereign, Vitoria dauntlessly dismissed imperial claims to world supremacy. This was in line with inveterate Spanish tradition; but opposition to imperial supremacy required resolve when the Emperor was identical with the King of Spain; and criticizing the methods of Spanish conquest was an even greater proof of moral strength. Vitoria took a vigorous stand against the misdeeds of the conquistadores and showed humaneness and intelligent understanding toward the Indians, in respect to whom he felt keenly the missionary obligations of his order. He warned the Spaniards against self-complacency by reminding them that among their peasants many were "not much better than brute beasts." Even where the Indians tried to expel the Spaniards or slay them, Vitoria insisted the Spaniards should confine themselves to self-defense rather than resort to aggressive warfare. In this connection he pointed out that the natives were frightened in their very timidity and dullness by the sight of strange men with powerful weapons, even though the Spaniards might attempt to allay their fears and assure them of their peaceful intentions.

Vitoria was even willing to grant the exception of excusable ignorance regarding the reasons of those Spanish claims which he considered legitimate. The fight of the Indians against the Spaniards was thereby recognized as possibly "just," though only in a subjective sense. In these and other statements Vitoria revealed moderation and wisdom unusual in his day. He is also said to have been an outstanding theologian, a renovator of the scholastic method, and a teacher of extraordinary gifts. His fame proved lasting.

Vitoria's significance in the history of international law is commonly based on verbal grounds. Quoting the passage in Justinian's Institutes regarding those bound by the *jus gentium*, he replaced the *inter homines* (among men) of the original text by *inter gentes*. This has quite erroneously been taken as a reference to the law among "states," hence to international law. However, *gens* (pl. *gentes*) does not mean

"state." It is a vague term approximately equivalent to "people"; as we have seen, the Institutes themselves apply the term "*jus gentium*" to relations *inter homines*.⁸¹ Wherever Vitoria envisages something like a state, he speaks of *respublica*.⁸² In fact, his further discussion of *jus gentium* gives not the least indication that he employed *jus gentium* in any novel sense.⁸³ His deviation from the text of the Institutes was only one of language, perhaps a slip of memory.⁸⁴

However, Vitoria's claims as an anticipant of international law can be supported for better reasons. Medieval writers had taken the view that the heathens were nothing but the proper object of conquest, conversion, and subjection, a theory adopted by a number of his Spanish contemporaries, especially by the royal historiographer Juan de Sepúlveda.⁸⁵ Vitoria was the first to insist that the heathens had legitimate princes, just as the Christians had, and that a war against them was permissible only for a "just cause."⁸⁶ This meant a great step forward in the direction of international law. Still, at the same time, Vitoria deemed the pagan princes duty-bound to admit Christian missionaries, whose appointment the Pope might reserve to the Spaniards, "the ambassadors of Christianity." Resistance to the work of the missionaries, as well as any measure against Indians converted to Christianity, would constitute, in Vitoria's judgment, a good cause of war and would entitle the Pope to depose Indian rulers in order to replace them with Christian princes. Vitoria's system, therefore, did not indicate, as it sometimes has been asserted, "equality" of Christian and pagan princes⁸⁷—much less equality of "states," which was not considered by Vitoria in this connection.⁸⁸ (Admission of non-Christian missionaries in Spain was, of course, unthinkable.) It is not necessary to enlarge upon the crucial political consequences of this discrimination against the Indian princes.

Other limitations of Indian independence were phrased by Vitoria in general or reciprocal terms. Under the rights and duties of hospitality, he asserted, the Spaniards were entitled to travel among the Indians and carry on trade with them, to import goods and to export gold or silver or other wares of which the natives had abundance; contrary regulations by the Indian princes would be invalid as violating natural and divine law. Spaniards might moor their ships in Indian rivers and harbors; likewise, the Spaniards might not be prevented from digging for gold in Indian lands and fishing for pearls in the sea or Indian rivers, provided "other foreigners" were allowed

to do the same. The Pope, for reasons of the faith, might grant the Spaniards the monopoly of Indian trade in the same way that he granted them monopoly of evangelization.

The whole line of argument is derived from Holy Scripture, from natural law, and from *jus gentium*. Vitoria emphasized that, under the law of nature and according to St. Matthew, the Indians had to love the Spaniards. His conclusions drawn in the scholastic manner are often unconvincing to the modern reader, and the general "reciprocal" character of the alleged duties of the Indians is more or less specious. Still, we are not concerned with the conclusiveness of Vitoria's theories, but rather with the extent to which they have influenced international law or its doctrine. Such influence is definitely out of the question with respect to traveling abroad, digging for gold, or fishing for pearls. Never has practice or doctrine of international law claimed self-sustained rights of that kind for foreigners.^{88a} The same is true regarding the export of gold and silver. However, the general idea that trade among individuals of various nations must be permitted⁸⁹ was adopted by Gentili and Grotius. For later representatives of the natural-law doctrine it became, in a modified form, the principle of "freedom of commerce." Vattel,⁹⁰ for instance, proposed an "imperfect" right to trade with foreign nations, a right to be made "perfect" (that is, real) by treaties of commerce. In actual state-practice "freedom of commerce" was never a rule of law but at best a principle of commercial policy.

Regarding the law of war, Vitoria achieved considerable progress, as has been indicated, by recognizing, in a form consonant with his theological conscience, the fact that a war might be just on either side. On the other hand, he attributed the role of a judge to the victorious prince, if his cause was "just"—an objectionable theory.⁹¹ With the Saracens he did not much concern himself; but he stated that Moslem prisoners of war might be indiscriminately killed, and their wives and children committed to slavery. In this respect, therefore, he did not differ from the prevailing opinion of his day.

To sum up, Vitoria accorded to the pagan rulers a legal position similar to that of Christian princes; he initiated the idea of freedom of commerce; and he took a momentous step toward extending the benefits of the law of war to both belligerent parties.

Nevertheless, the modern reader might be shocked as already intimated by some of the reasons advanced by Vitoria in favor of the

Spanish conquest. It is characteristic of Vitoria's honesty that he did not feel entirely sure of his arguments. At the end of the lecture on the Indians, he took up the hypothesis that none of his reasons in favor of the war against the Indians or of the occupancy of their territory might be valid. Even then, he said—pointing to the example of the Portuguese—there would be no reason to stop trading with the Indians and exporting gold and silver from their lands. A resulting “unbearable loss” to the royal treasury could be averted, he said, by imposing a tax of one-fifth or more on the imported gold and silver in return for the navigation and protection provided by the King. Almost as an afterthought, he added in the last sentence that because so many Indians had been converted to Christianity it would be neither expedient nor permissible for the King to abstain entirely from the administration of those “provinces.” The reader gets the impression that Vitoria was in some ways disheartened by what had happened there.

In historical perspective, one must remember that the era of great discoveries and extensive colonization resulted, on the whole, in the advance of civilization in the colonial areas. Vitoria himself intimated that Spanish administration might well be to the best advantage of the natives, although he did not press the point. Still, as a Spaniard proud of his country—and this pride appears everywhere in his writings—he could not possibly bring himself to advise his compatriots to renounce their tremendous new acquisitions for scruples of moral theology. In his day the Spanish conquest was no longer a subject of controversy. The only and very necessary thing for a theologian to do was to warn the conquistadores against misuse of their power. This Vitoria did vigorously and authoritatively.

Vitoria has been emphatically praised as a liberal.⁹² No tribute to him could be more inappropriate. He was a staunch, if not extreme, advocate of ecclesiastic and papal authority. Not only did he grant to the Pope the formidable powers over temporal rulers mentioned above; he also asserted that a layman in dubious moral cases must not rely on his own insight but must consult and obey his spiritual adviser. The layman's action, he declared, is not even justified by its objective lawfulness; what matters is the advice of the priest. This thesis which implies the compulsory and supreme authority of the priest in most matters of public and private life contradicts, as stated by Vitoria himself, even the opinion of his late Master General, the

Cardinal Cajetan. And Vitoria, as an expert of the Spanish Holy Inquisition in the heresy proceedings against Erasmus of Rotterdam, held him guilty on twenty-one counts, although in the Committee many high ecclesiastics were in favor of Erasmus who had vainly tried to predispose Vitoria favorably by a personal letter. How deeply he was immersed in medieval tradition appears from the fact that he considered Christianity as a kind of state (*respublica*). The Christians could, therefore, by majority decision unite the whole Christian world into one state under one monarch, and the Church could compel them to do so.⁹³ This again was a rather radical view, in which he had only a very few predecessors.⁹⁴ Even in the secular field Vitoria was an authoritarian rather than a liberal. In contrast to the majority of Catholic writers he stood for the divine character of monarchy, without permitting resistance to "tyrants"; and in strong terms he advanced the opinion that commands given by parents to their children and by husbands to their wives were binding. However, though not a liberal, he was certainly a high-minded, upright, and powerful thinker.

FRANCISCO SUÁREZ

Francisco Suárez (1548–1617),⁹⁵ born of Spanish nobility, was, like Vitoria, a professor of theology. Although free of worldly ambition, he early won high renown and the favor of Philip II. In 1596, after the Spanish conquest of Portugal, the king caused the chair of theology at the Portuguese University of Coimbra to be conferred upon Suárez, obviously following a policy of imbuing the university with Spanish spirit. Suárez was a vigorous thinker of extraordinary acumen, and a lucid writer with an astounding capacity for work; he left an opus which, in a nineteenth century edition, fills twenty-eight quarto volumes, besides a number of unpublished manuscripts. While averse to offensive language in polemics, he practically ignored the writings not only of Protestant authorities but also of those Catholics who, like Bodin, did not honor the dogma. More than any other Spanish theologian of his day, he was rooted in medieval tradition and Thomist teachings—the "most scholastic of the scholastics," or, as he has been called by others, "the last of the scholastics." He is regarded as the most illustrious member the Jesuit Order ever had and an outstanding representative of Spanish culture. Several biographies have been devoted to him.

Though essentially a scholar, Suárez was a stern fighter. Repeatedly he entered the politico-ecclesiastic arena. When the General of the Jesuit Order, Almazán, found it necessary to defend the Order against accusations by Catholics and Protestants he entrusted the task to Suárez. And shortly before his death Suárez was able to settle, in favor of the Church, a serious jurisdictional conflict between the secular and ecclesiastical authorities of Portugal.

To the public at large none of his writings has become more widely known than *Defense of the Faith Against the Errors of the Anglican Sect* (1613),⁹⁶ written on the request of Pope Paul V. James I of England had exacted from his Catholic subjects an oath of fealty which, among other points, included the denial of the papal power to depose him or to release them from their duty of obedience. Suárez's discourse was a scholarly attempt to prove, in theological terms, the existence of those papal powers which would even include the right to put the heretic king to death in order to protect the Catholic faith. All this was more or less an elaboration of familiar Church doctrine, but Suárez bolstered his attack with a different line of thought. Political power, he held, was based on the sociability of man and resided directly in the people, who might "delegate" it by way of "human" law to a prince for the welfare of the community; but if the prince turned out to be a tyrant the people might use their right of self-defense and even dethrone him. Suárez's doctrine clearly tended to discriminate against and play down the temporal ruler, because the Pope was not subject to similar control by the people. His treatise was condemned and prohibited not only in England, but also in Catholic France. Nevertheless his theories of the secular character of the state and of popular sovereignty came to be widely acclaimed by Catholic and by later Protestant writers. In the history of political thought, Suárez therefore holds a distinguished position.

With matters pertinent to the law of nations, Suárez dealt mainly on two occasions: by his analysis of the *jus naturae* and the *jus gentium* in his great tractate, *On Laws and God as Legislator* (1612),⁹⁷ and by his discussion of the law of war in the chapter dealing with charity in his posthumous work, *On the Threefold Theological Virtue*.⁹⁸ (Treatment of the law of war in a dissertation on charity is in line with Thomist tradition, war being contrary to charity.) Suárez's point of view is theological, of course, but it is far more on the juridical side than Vitoria's. His approach is more detached, more systematic,

and much more conceptualistic. The analysis of the *jus naturae* and the *jus gentium* is the more valuable and important of the two studies. Suárez was the first to perceive the ambiguity of the crucial term, *jus gentium*. This term, he says, may be given two meanings. In one sense it is the law which all the *populi et gentes* must observe in their reciprocal relations (*inter se*); in the other sense it is the law which the *civitates vel regna* observe within themselves (*intra se*), and which for reasons of similarity and convenience, is called *jus gentium*.

There can be no doubt that, despite a certain laxity of language, Suárez envisaged by the second alternative the universal law as conceived by the Romans. The first alternative calls for closer inquiry.

It is important to bear in mind that Suárez is concerned not alone with the *jus gentium*; he is concerned also, on the one hand, with the natural law, which is fundamentally divine, and, on the other hand, with the "civil law" known from Justinian's Institutes to be the particular law each nation establishes for itself (the municipal law).

Jus gentium, we remember, had been defined by Isidore of Seville as the universal law recognized by almost all nations—a definition adopted by later writers. But Suárez rejected the definition apparently because it did not satisfy his sense of precision. Instead he found the difference of the precepts of *jus gentium* from those of the civil law in that the former are not established in written form; in other words, they are based on custom—a fact which seemed to him to be their characteristic quality.

Now "civil law" is by no means invariably "written," but is derived in part from custom; and *jus gentium*, if deemed to include international law in the modern sense, may be, and is in our day, to a great extent written. Suárez's mistaken characterization leads him into a confusing terminology. He links the *jus gentium* in the first, the "international," sense to *populi et gentes*, terms related to natural groups of men rather than to legal entities (states). In contrast he links the *jus gentium* in the second, the "universal," sense to *civitates*⁹⁹ *vel regna*, terms which correspond more closely to our "state." The correct terminology would have been the reverse one. But apparently Suárez felt that custom is something informal,¹⁰⁰ a natural phenomenon, related as such to *populi* and *gentes* rather than to *civitates vel regna*, which are governed by written law. As a result, the true international law was not yet clearly seen by him.

Moreover, his "international" *jus gentium* covers only a segment

of the "international" area. All human relations whatever their kind, and therefore including those existing among *populos* and *gentes*, are in the first place governed by the natural law of divine origin; ¹⁰¹ according to Suárez this law is merely supplemented by the *jus gentium*, which he considers as "human" and as "intermediary" between "natural law" and "civil law." Specifically, he represents the obligation to observe treaties—he mentions only treaties of peace and of truce—as one of natural law, not of his "international" *jus gentium*. Instead, Suárez advances, as an example of the latter law, the precept that such treaties should be accepted and not rejected when presented in due manner and for a reasonable cause. Yet the decision on such an offer is clearly a matter of policy rather than of law, or at best a matter of morality, that is in his system, of natural law. Other instances of his "international" *jus gentium* are likewise ill chosen, ¹⁰² but it is not necessary for the present inquiry to probe further into this subject. Suárez himself does not elaborate much his "international" *jus gentium*. As a theoretician and a systematician he is primarily interested in *jus gentium* as such, whatever its kind. We have seen that he tries to determine the relationship of the *jus gentium* to civil law; however, he is far more concerned with the relationship of the *jus gentium*, whatever its kind, to natural law. In this respect he follows the example of his master, Thomas Aquinas ¹⁰³—a disposition diverting him from a closer inquiry into the particular features of his "international" *jus gentium*.

The interrelation between natural law and *jus gentium* is relevant also to a correct appraisal of the following sentences from the work *On Laws and God as Legislator* which have been quoted again and again in recent times, and more than anything else have contributed to Suárez's renown in the history of international law:

The human race though divided in different peoples [*populos*] and realms [*regna*] still has a certain unity, not only as a species but, as it were, politically and morally as is indicated by the precept of mutual love and charity which extends to all, even to strangers of any nation whatsoever. Therefore, though each perfect commonwealth [*civitas*], state [*respublica*], or realm [*regnum*] is in itself a perfect community, consisting of its members, nevertheless each of these communities, inasmuch as it is related to the human race, is in a sense also a member of this universal society. Never, indeed, are these communities, singly, so self-sufficient unto themselves as not to need a certain mutual aid and association and communication,

sometimes for their welfare and advantage, sometimes because of a moral necessity or indigence, as experience shows. For this reason they need a law by which they are guided and rightly ordered in respect to communication and association. To a great extent this is done by natural reason but not so sufficiently and directly everywhere. Hence, certain special rules could be established by the customs of these nations [*gentes*]. For just as in one commonwealth [*civitas*] or province [*provincia*] custom establishes law, so among the human race as a whole rules of *jus gentium* could be established by usage [*moribus*]. This is true all the more because the rules pertaining to that law are few.”¹⁰⁴

It appears that the entities referred to are not uniformly denominated by Suárez, because he employs the terms *populus*, *regnum*, *civitas*, *respublica*, and even *provincia*,¹⁰⁵ indiscriminately. There is in this respect also a variance with his original definition of his “international” *jus gentium*; but it is obvious that Suárez envisages here, at least in principle, the mutual interdependence of states. He thereby points for the first time to a most important determinant in the formation of international legal relations, and he does so in poignant language. Still, it is erroneous to represent the cited passage as the initiation of a comprehensive and modern international law. With Suárez the natural law takes first place in human relations. He merely wants to demonstrate that the law of nature does not cover the whole area of *inter-gentes* relations; there the law of nature is supplemented by a human (nondivine) *jus gentium*. He hastens to add that the rules of that law are “special” and “few”¹⁰⁶—a qualification of great significance, but too often overlooked by commentators. Nor does he elaborate on the conception of the interdependence of states, as he could easily have done—for instance, in the discussion of war; the conception remains an isolated element in a particular line of argument. Even there he is still preoccupied with the divine law of nature. That is why he tries to explain the necessity of the limited and “human” *jus gentium* in terms of “mutual love and charity”—attributes hardly appropriate to states, and actually applied in Suárez’s context to “strangers of any nation,” that is, to individuals.

All in all, Suárez was the first to single out from the motley *jus gentium* a particular species which, though not yet clearly and fully representing international law, was definitely an important step in the right direction. The dualism of *jus naturae* and *jus gentium* was, of course, part of the old scholastic tradition. Whatever the value of

its extension by Suárez to international relations, it probably influenced later writers, including Grotius. And the ingenuous reference to the interdependence of states shows Suárez's insight into the changing structure of the political world. The fact that Spain was no longer the power that it had been may have influenced him.

His ventures in other segments of international legal relations were less successful. In two brief chapters of the work *On Laws and God as Legislator*, he undertook an excursion into the thorny field of private international law. Relying primarily on some canonists and on Bartolus, he showed himself unfamiliar with the later theory of statutes and particularly with the French doctrine of the sixteenth century. He also tried to infuse specifically theological elements into the discussion of private international law, a strictly legal subject. This part of his work was definitely unsatisfactory.¹⁰⁷

Suárez's most controversial contribution to our field was, however, his study of just war. He analyzes the reasons justifying war, in a cold, legalistic manner which strikingly contrasts with Vitoria's warm and humane reasoning. His instance of an action violative of charity is the war of a Christian prince which would result in increasing the power of the enemies of the Church; such conduct, he points out, would violate the charity owed to the Church. The main concerns of Suárez are certain conceptual relationships, especially the one between justness and charity. Can a war have a good cause and still violate charity (as possibly in the above example)? If so, what are the consequences with regard to reparation of damages? Suppose a war is begun on either side without a legitimate cause. Would this run counter to justice and to charity? What if the prince rules several states and the war is profitable to one of them and hurtful to another? Are there just causes of war except those flowing from natural reason? Is it permissible for a cleric to wage war? Of real charity in war we hear nothing. Vitoria's wise thesis that ignorance of injustice would be an excuse is touched upon by Suárez in a way that makes it doubtful whether he approves of it at all. The hypothesis that war may be just on both sides, he condemns as "entirely absurd." Nevertheless, he does not insist that war should be waged only where the right pursued is certain; using a notion of scholastic moral theology, he considers it sufficient that the prince's claim is supported by the "more probable" opinion¹⁰⁸—a tenet objected to early and for good reasons.¹⁰⁹

How little Suárez's subtlety enabled him to draw workable con-

clusions from his rigid just-war premise appears from what he explains about the responsibilities of the ordinary soldier. On principle, soldiers of a prince who wages an unjust war, if taken prisoner, would not enjoy the protection of the *jus gentium* but might be killed, according to Suárez. Still, through various distinctions, exceptions, and presumptions, he tries to save most of them. For example, in his opinion mercenary soldiers, when doubtful about the justness of their cause, are protected by the law if their doubt is "negative," that is, if they do not know of "probable reasons" favorable to the other side; in the case of a "positive doubt" they would have to start a search of their own and follow the "more probable" opinion, lest they be at the mercy of their captors!

The most objectional feature of Suárez's doctrine of just war, however, is his "judicial" theory. What with Vitoria had been a point of secondary significance is developed by Suárez into a rigid legal system. According to him, the prince who wages a just war has a real "jurisdiction" pertaining to "vindicative justice"; the belligerent action of the prince is likened to the decree of a law court. The obvious objection that the plaintiff cannot be a judge at the same time is answered elusively by the observation that war, as an act of vindicative justice, is indispensable to mankind, and that no better method has been found. While on religious grounds he claims for the Pope general arbitral power over Christian princes, his attitude toward secular arbitration is utterly reserved. He recommends arbitration "in case no injustice is to be feared," but he weakens this half-hearted counsel by his further statement that for the most part each sovereign suspects the good faith of foreign judges. Generally, therefore, he deems it sufficient for the prince to consult "wise and trained men." If they find the right of the prince evident, such finding is strangely taken by Suárez as a quasi-judicial proceeding upon which the prince, being himself the judge, need no longer apply to others for their decision. On the contrary, the prince now has "jurisdiction" to enforce his rights; "one does not see why he should be bound to engage in arbitration by another person." A sounder view was taken more than half a century earlier by Pierino Belli when he said that rulers "often have evil advisers, ecclesiastical as well as lay, who, either to curry favor or through fear, frame all their speeches to suit them, and manufacture and seek out justifications for their party so that it may appear that their cause is righteous."¹¹⁰

Suárez's "judicial" theory—known in his lifetime—runs counter to common sense, and among the early objectors to it were Gabriel Vasquez (1551–1604) and Luis Molina (1536–1600), prominent members of the Jesuit Order.¹¹¹ Molina definitely took the view that a war may be subjectively just on both sides. Even so, Suárez retains sufficient merit to deserve an honorable position in the precursory phases of international law. Among the scholastics, Vitoria, whose authority he frequently invoked, was Suárez's superior in his deeply humane attitude, in his remarkable common sense, and, indeed, in his originality, though Suárez excelled in juristic acumen.

MILITARY WRITERS: PIERINO BELLI AND BALTHASAR AYALA

In the Spanish tradition, military law was early associated with the *jus gentium*. We have observed this in the case of Isidore of Seville. In the *Siete Partidas* the chapter on war, while primarily of military import, included discussions of just war and the law of embassies. The same line of thought was followed by two authors who had been military auditors in the armies of Philip II: Pierino Belli (1502–1575) and Balthasar Ayala (1548–1584).

Pierino Belli, an Italian, published *On Military Matters and War*,¹¹² shortly after he had shifted, in 1561, from the Spanish to Savoyan service, in which he gained high distinction as a statesman. The book, which is dedicated to Philip II, discusses a miscellaneous and ill arranged collection of subjects somehow connected with military matters and war, giving special attention to the jurisdiction of the various military authorities, to the pay and other privileges of soldiers, to booty, to prisoners, to truces, and to safe-conducts.

Of greater interest are the chapters on the power to declare war, and the grounds for doing so. In these matters Belli, a faithful Catholic, follows the just-war doctrine of the scholastics. Elsewhere he relies primarily on Roman legal sources and the medieval commentators. He also draws on some later writers on military subjects¹¹³ and on ancient historians; citations are superabundant. Frequently he refers to observations made, and opinions rendered, in his capacity as an auditor. This gives his book a distinctive practical tone which is entirely absent in the writings of the scholastics. We have seen how he felt about ecclesiastical and lay advisers of princes. He shows a marked advance over his predecessors by indiscriminately condemning any

cruelty against prisoners and by insisting upon fair treatment of inhabitants of occupied enemy countries.¹¹⁴ Among his statements regarding international law perhaps the most notable is the assertion that, if a ruler shows himself willing to arbitrate, warlike proceedings ought to be stopped lest the war—so it seems—become “unjust.” Here is set forth the principle not only of arbitration but of compulsory arbitration. Still, Belli’s remark is made in a rather perfunctory fashion.

Balthasar Ayala, born in Antwerp of noble Spanish parentage, served in the high position of Auditor General (which may be likened to that of the American Judge Advocate General) in the army sent out by Philip II against the Netherlands. He published *On the Law and Duties of War and Military Discipline*¹¹⁵ in 1582; two years later he died, only thirty-six years old. While the second book of his volume is concerned with strategy and war policy and military discipline, which is of course a matter of domestic (Spanish) law, he offers in the first part a coherent discussion of the law of war. We are concerned only with this part of his work.

Politically, his work testifies to the inexorable fervor of the fight for Spain and Catholicism—presenting even tenets of extreme cruelty or perversion in a cool and logically disciplined manner. Nevertheless, his contribution to the evolving international law was definitely valuable. He gave the thought of the Spanish school a secular turn without opposing the theologians; Suárez cited him repeatedly with approval. First of all, Ayala related his just-war doctrine to “equity and the duty of a religious man,” rather than to legal effects. Moreover, he declared it “inappropriate” to discuss the equity of a cause in a war between sovereigns. Apparently because of his respect for sovereigns, Ayala indicated that a war between legitimate sovereigns, lawfully conducted, might in a sense be called just on both sides. Historically, all this amounts to a mundane revision of the traditional war doctrine, a revision especially significant because it was set forth by a representative Spanish Catholic.

That revision, it is true, did not apply to the fight between Spain and the Netherlands. Leaning on Bodin and others, Ayala extolled royal power, which he, like Vitoria, considered divine in origin. The king must be considered *ipso facto* as a “parent” to his subjects. Even if he were unjust and cruel, there could be no just cause for rebellion. Under all circumstances, rebellion was a heinous crime against God

and king and must be likened to heresy and parricide. This was a twist of scholastic tenets, but for this very reason Ayala's tractate was the most detailed inquiry into the consequences of unjust warfare. The Spanish theologians had not much elaborated this point; they were more interested in the logical analysis of the just causes of war. Hence, Ayala's tractate implemented in a measure their teachings.

More important, Ayala introduced into the doctrine of the law of war the principle that good faith must be kept with the enemy. He contrived, it is true, numerous and, in part, shocking exceptions: good faith need not be kept with those waging an unjust war or with rebels; also, a prince's waiver of rights inherent in his sovereignty is invalid even if made under oath. But Ayala must be credited at least with having established a salutary principle.

Ayala's opinions were largely determined by his purpose of explaining and justifying the inhuman and treacherous Spanish warfare in the Netherlands. The States-General had deposed Philip II as their ruler on the ground that he had willfully violated his oath to maintain their liberties. This question of constitutional law, Ayala would not even touch upon. To him the Netherlands, to which he generally refers only by indirection, were rebels not protected by the law of war; they had to be treated as brigands and robbers. Such rebels might be killed and enslaved, and their property might be taken as booty. Agreements with them need not be observed. The "usurper" of royal power might be slain by anyone. This amounts to a justification of any treachery and especially of the subsequently successful Spanish edict which promised 25,000 gold crowns and the grant of nobility to the murderer of William of Orange.

In a sense, Belli and Ayala may be taken as representatives of Italian and Spanish spirituality. A considerable merit of both writers consists in the fact that they have assembled and made available much material from secular sources not employed by the scholastic theologians. Ayala, who had enjoyed an excellent education in the classics, drew heavily on good ancient writers—historians and others. Where it suited his purposes, he also cited writings not only of contemporary religious skeptics like Bodin, but of Protestants like Molinaeus. This, too, points to a drift away from the theological position. Through their more varied references, Belli's and, to a greater extent, Ayala's books became a mine of information for later authors.

ALBERICO GENTILI

Alberico Gentili (1552–1608), born at Sanginesio, a North Italian town, the son of a physician, studied law at the University of Perugia where, at the age of twenty, he took the doctor's degree.¹¹⁶ After he had practiced law in various capacities, he and his father, having embraced the Protestant faith, fled Italy in 1579 before the Holy Inquisition, which sentenced them *in absentia* to penal servitude for life and confiscation of their property. Meanwhile, the Gentilis, after temporary stays in Austria and Germany, reached London and were well received, like a number of other distinguished Italian Protestants. Very soon Alberico Gentili became a lecturer on civil (Roman) law at the University of Oxford. He quickly won renown, and, as we have seen, the English government consulted him in 1584 in the Mendoza case.

The consultation proved momentous for Gentili because it drew his attention to international law. Utilizing his studies in the Mendoza affair, he published in 1585 a monograph *On Embassies*.¹¹⁷ In 1586 he left for Germany, intending to make his home there; but he returned to England in 1587, whereupon he was appointed Regius Professor of Civil Law at the University of Oxford. As such he had, like other professors, to deliver formal addresses at the annual presentation of doctoral degrees. In 1588, the year of the great Armada, he chose as the subject of his address some timely aspects of the law of war. This lecture became the nucleus of his main work, *On the Law of War*,¹¹⁸ published in 1598. In 1600 he began to practice law in London in addition to his functions as a professor, and in 1605 he accepted, with the consent of King James I, the position of counsel to the legation of Spain, which was then at war with the Netherlands—a somewhat puzzling step for a Protestant refugee to take. His posthumous volume, *Pleas of a Spanish Advocate*,¹¹⁹ was the literary fruit of his counseling activities.

Besides these works on international law Gentili wrote a great number of essays and pamphlets on civil law and theology as well as political subjects. In the last field, after the accession of James I to the throne (1603) he gave sweeping support to the extreme absolutist theories cherished by the king, although in his *Law of War*, written in the time of Elizabeth, he had advanced liberal views—a change re-

warded by royal grace. In religious matters, while strongly advocating liberty of religion, he leaned to orthodox opinions, originally along Calvinist lines, later more in conformity with the doctrines of the Anglican Church. In 1603 his works were placed on the Index Librorum Prohibitorum.

Gentili's work on international law covers, for the first time, practically all pertinent problems of the period. The question of embassies, then in the foreground of public discussion, had evoked a number of essays prior to Gentili's study. He took a strong stand against the widespread loose and even reckless theories on the functions of ambassadors, who were then often looked upon (not without reason) as a kind of spy. At the same time he declared himself in favor of the principle of their inviolability, which in fact had been recognized in western civilization from time immemorial. Still, he proposed to keep the immunity of ambassadors in narrow bounds. He believed the ambassador was exempt from the criminal jurisdiction of the receiving country only in the case of a conspiracy *which was not carried into effect*, because under natural law, his basis of *jus gentium*, the mere attempt at a crime was not punishable—a more than questionable argument. In civil matters, Gentili denied that the ambassador was immune from the jurisdiction of the receiving country with respect to contracts he might make, but held that authorities of the receiving state must neither seize his movable property nor enter his house. Gentili's study constitutes the first systematic examination of the subject, and shows considerable progress over earlier studies.

Gentili's *Law of War* centers in the traditional manner on the issue of just war. It is divided into three books. The first is concerned with the causes of war, the second with warfare, and the third—a novelty—with peace treaties. He considers as a war only a contest between public armed forces, thus discarding the "private" wars of old. His treatment is far more comprehensive than that of the scholastics, including Suárez, who came after him; and his discussion of the law of treaties, an extremely important matter, which was greatly neglected by his predecessors, is one of the most valuable parts of his work. Gentili does not yet possess a general theory of treaties. He deals separately with peace treaties, alliances, and a few other international agreements, but his analysis allows some general conclusions. For instance, in the Middle Ages treaties were largely considered binding only during the life of the signatory potentates; Gentili, though he

admits exceptions, is guided by the notion that treaties are binding upon the successors as well as the peoples of the covenanting rulers. He furthermore shows that a defeated prince cannot annul a peace treaty on the ground that he was induced to agree by fear or duress. This view, which necessarily holds good for treaties of any kind and has been generally accepted in this sense by writers on international law, bespeaks a basic insight of Gentili's; namely, that the law of private contracts which does permit invalidation on the ground of fear or duress cannot simply be carried over to the law of treaties.

Gentili's most important contribution to the latter law consists in his tenet that one has to read into a (peace) treaty always a tacit condition to the effect that the treaty is binding only as long as conditions remain unchanged. The far-reaching consequences of this so-called *clausula rebus sic stantibus* are evident. Ancient Roman law had not known that *clausula*. Gentili relies on the authority of Alciatus (1492–1550), an outstanding Italian writer on civil law, but the *clausula rebus sic stantibus* doctrine was several centuries older. It originated in canon law, which tended to temper with considerations of equity the rigor of the Roman private law.¹²⁰ The new tenet was adopted by the "civilians," and Gentili introduced it into international law. There it has stood its ground down to the present, whereas it has generally disappeared in its original province, private law.

The subject of alliances, Gentili couples with that of neutrals, about which very vague ideas were prevalent in his time, and indeed much later. Invoking the moral unity of the world, he takes an interventionist stand. He proposes that the neutral (he does not use this expression) ought to aid an ally beyond the terms of the alliance whenever the ally is unjustly attacked, and ought to aid not only the ally but also other nations similar to the neutral in race or blood or religion—we are in an era of religious wars, and Gentili's allegiance goes to the country that came to the aid of the Netherlands in their struggle against Spain. The just-war doctrine assumes here an unexpected Protestant version.

Pope and Church, of course, have no place in his system. While Vitoria has told the jurists that his subject matter is not for them, Gentili, discussing the question of war against the Turks, warns theologians "to keep silent on matters outside of their province." Ecclesiastical dispensation of oaths or arbitral power of the Pope is no longer a matter of discussion. Instead, Gentili takes a strong stand in favor

of international arbitration "by experienced judges," whom he advises to avail themselves of Justinian's *Corpus Juris*. Among the just causes of war he does not mention, as did the scholastics, interference with the propagation of the gospel or opposition to the acceptance of the Christian faith. Nor does he justify greater cruelty in the warfare against Saracens, though he still looks upon them as potential enemies and will allow treaties with infidels only on terms which render them tributary to the Christian power, or else in commercial matters (obviously a vindication of early Italian practice).

Most significantly Gentili departs from the teachings of the scholastics by stating that a war may be just on both sides, and not only because of excusable ignorance, as Vitoria concedes, but objectively. Gentili adds that there may be differences in the degree of justness. Moreover, again citing Alciatus, he holds that the belligerents' rights in war with respect to prisoners, booty, and so on are independent of the justness of their cause. Gentili does not pause to reflect whether under his theory the doctrine of just war has preserved any *legal* significance at all; still, like Ayala, he sees the light—progress illustrated by the fact that more than twenty years later Suárez in this matter falls back behind Vitoria. He also justifies the protection of women, children, priests, and other groups from the horrors of warfare not so much because of their "innocence" in the starting of the war as on broader grounds of humaneness drawn chiefly from the ancient authors.

Gentili's secession from the scholastic tradition is conspicuously reflected in his documentation. True, he refers sometimes to the Scriptures—with characteristically Calvinist predilection for the Old Testament—and among the theologians to St. Augustine, high authority also for Protestants. But these are exceptions. The profane literature—legal, historical, philosophical—dominates, with the *Corpus juris civilis* and Baldus in the fore. Gentili lays particular stress on historians, because he is anxious to adduce in support of his tenets historical instances which he gathers mainly from ancient writers but also from later ones up to his own day. To the modern mind his documentation is often farfetched, yet he enlarges the area of research far beyond the achievements of his predecessors; his erudition is imposing indeed.

However, one does not see clearly the theoretical basis of his reasoning. While his treatise on embassies relies on the authority of the *Corpus juris civilis*, his work on the law of war invokes primarily the

law of nature (occasionally referred to in his earlier treatise), and he acknowledges in the Introduction the inadequacy of the *Corpus juris* on the subject matter. Nevertheless, elsewhere in the same work he affirms that the *Corpus juris* is not wholly unlike the *jus naturae et gentium*, and he applies, for instance, to the legal effects of a conquest or to the binding force of a treaty the typically Roman idea of the heir's "universal succession." On the other hand, he calls the natural law "divine"; but he is neither clear nor consistent in this respect. Certainly his natural law is not the self-contained body of moral rules evolved by the scholastics; it is simply what a sound mind teaches us as being "manifest."

Still more obscure is his notion of *jus gentium*. Sometimes he identifies it with the law of nature; at other times he treats it as a derivative of the latter. Apparently his idea of *jus gentium* is that of universal law, rather than of a law between states. True, his treatises are concerned with matters which today are labeled "international law"; but there is little attempt at defining a general idea behind them.¹²¹ The world-wide society to which he occasionally refers is obviously the human race, the moral society of mankind in the medieval sense. At the same time, he is probably under the influence of the traditional notion held by medieval Italian jurists, of a universal secular law centering on the *Corpus juris*, so highly venerated by him. The academic occasion to which the work on war owed its origin may have suggested to him the idea of treating the subject in the light of the discipline he represented in the university. And in his emphasis on Roman law he is in full agreement with the English conception of international law, as we have seen.

The posthumous *Pleas of a Spanish Advocate*—a collection of pleas and opinions on various legal matters of international and domestic import—requires special consideration. Its documentation is preponderantly taken from recent French, Italian, German, and other continental writers on civil law, rather than from Roman sources; and references to nonlegal writings are rare. This makes the discussion more juristic and more succinct. Gentili particularly examines questions of public maritime law which, at the time, have begun to gain rapidly in importance owing to improvements in navigation and to the discovery of America and other lands. He advocates freedom of the seas but subjects this principle to heavy restrictions. He not only reserves to the sovereign of the coast the exclusive power (*dominium*) over

the coastal waters—a view confirmed by subsequent political and doctrinal developments—but takes an extreme stand by extending the normal range of the dominated coastal waters to one hundred miles, whereas later the range of cannon, or three miles, was generally accepted. Moreover, Gentili grants to the sovereign a vague “jurisdiction,” as distinguished from *dominium*, over the high seas. This jurisdiction would enable the sovereign to take measures against pirates and apparently to exercise some ill defined power over other seafarers. Obviously his opinions agree perfectly with the interest of that great sea power, England.

A complacent attitude also appears in Gentili’s treatment of privateering, a method of warfare in common usage, and recognized as lawful in his *Law of War*. When, however, in the *Pleas of a Spanish Advocate*, he comes to discuss booty captured under letters of marque by Dutch privateers from Spaniards, he denounces the Dutch as pirates. In this connection he utilizes his conception of “jurisdiction” because the Dutch had been detained on the high seas by the English (at peace with Spain) and taken to England: an action he interprets as an exercise of the said “jurisdiction.” Gentili condemns pirates in most violent terms as outlaws and as the common enemies of mankind. Whoever buys from them directly or indirectly does not acquire title in the goods, regardless of possible unawareness that the goods came from pirates. Hence, in a case where Englishmen have bought goods in Tunis from pirates, he holds them obligated to surrender the goods to the Spaniards, victims of the pirates and apparently his clients. However, in a similar situation, where the victims are Venetians, and Gentili’s opinion seems to have been requested by English clients, he reaches the opposite result on rather oblique grounds.

Nevertheless, on the whole, the *Pleas of a Spanish Advocate* makes Gentili’s opus in the field of international law more complete and more valuable. Apart from able discussion of various problems of maritime law and of matters of procedure, this work of mature experience indicates a new, inchoate conception of the *jus gentium*. The question arose whether among the judges sitting on appeal from an English Court of Admiralty there should be a common-law jurist. As one would expect, Gentili wanted to have all these appellate judgeships reserved to “civilians.” He rightly pointed out that the English common law of the time was not suited to lawsuits involving foreigners and to maritime cases, whereas in such situations “everyone would be

satisfied to be judged according to the *jus gentium* as found in the civil law." There was, Gentili maintained, no difficulty in the royal decree requiring the appellate judges to administer *our* law "since, though 'civilians,' they would have to apply the *English civil law*." (Italics added.) Here we have an early suggestion of the later idea that the law of nations is "the law of the land." Thus, ultimately, Gentili seems to have found a ground on which to moor his *jus gentium*.

A strong polemical strain permeates the whole work of Gentili. We need not concern ourselves with his theological quarrels. But in his writings on international law he is continually on the warpath. A favorite target of his pungent attacks is the contemporary humanist school of Roman law which, with great success, had arisen in France, he being strongly in favor of the scholastic school of thought connected with the names of Bartolus and Baldus, his countrymen. For the later (secular) writers on the law of war Gentili professes "no little contempt," a judgment certainly out of place with regard to an author such as Belli.¹²² Nor has he patience with the common-law jurists whom he invariably calls pettifoggers (*legulei*). Erasmus is a "flighty dilettante." The Catholic princes are accused in general terms of deceitful duplicity. Gentili warns specifically against making compacts with prelates because he alleges it is an established custom for the Church to renounce her obligations, regardless of promises.

Gentili's work long met with little recognition. For centuries he was mentioned in writings on international law only here and there—for the most part in Italy.¹²³ Grotius, who owed him much, accompanied his recognition of the fact with derogatory and partly unfair remarks which may well have influenced the judgment of later generations. The leading writers of the eighteenth century, particularly Vattel, did not mention Gentili. Nor was he cited by English or other courts.¹²⁴ A sudden and vehement revival was brought about in 1874 when T. E. Holland, on becoming Regius Professor of Civil Law in Oxford, chose the work of his predecessor Gentili as the subject of a brilliant inaugural lecture.¹²⁵ The lecture caused a tremendous reverberation in Italy. A committee for the erection of a monument to Gentili was founded under the chairmanship of Mancini, Italy's greatest authority on international law, and under the honorary presidency of the crown prince (later King Umberto). Streets were rechristened for Gentili, pilgrimages were undertaken to his family mansion in

Sanginesio, and a royal Istituto Technico Alberico Gentili was established at the University of Macerata. Dozens of monographs and articles on Gentili were published, and in 1908 a statue was unveiled at Sanginesio showing an ideal youth in the attire of an Italian Doctor Juris Civilis, no portrait of Gentili being extant. (Ironically the movement for the Gentili monument had led first in 1896 to the erection of a statue of Grotius in Delft, because the Dutch justly vindicated the latter's better claim to a monument.)

Undoubtedly Italian praise of Gentili was and is animated by patriotic motives which have brought about some overvaluation and misinterpretation of his work. He was represented by Italian liberals as a free thinker (which he was not) and a lofty herald of peace and concord among the nations—a debatable proposition. The Catholic Church stood in firm opposition. Only brief disposition is made of Gentili in the monumental *Encyclopaedia Italiana*. As a matter of fact, he belongs at least as much to England as to Italy.

Beyond Italy the revival of interest in Gentili has been conspicuous in more recent times. His three works on international law have been republished and translated in the Classics of International Law, and in 1937 a Dutch woman jurist, Dr. Gezina H. J. van der Molen, honored his memory with a monograph in English, perhaps the best biography ever written on an author in the field of international law.

In fact, Gentili's accomplishments were signal. A devout believer in God, he boldly initiated and carried far the secularization of international law; by the same token, he shifted the emphasis from moralizing to juridical treatment and opened new fields of pertinent information. By all these achievements he greatly widened the juridical inquiry into international relations. One may well call him the originator of the secular school of thought in international law.

If, in spite of Gentili's great merits, his work did not much impress his contemporaries or the following generations, the explanation must be sought not only in the absence of a deeper foundation of his teachings, but even more in certain defects of his personality. He was too much of a polemist and too much of an advocate. Gentili's writings did not provide the moral impulse on which the progress of the great cause of the law of nations depended. Gentili did not have the stature of a Vitoria, and much less that of a Grotius, to whom we turn in the next section.

HUGO GROTIUS: LIFE

Hugo Grotius, born in 1583 at Delft, was the offspring of a most distinguished and cultured Calvinist family.¹²⁶ His father, Jan de Groot, a scholar in various fields, was sometime Burgomaster of Delft and a curator (trustee) of the University of Leyden. In addition to the propitious external circumstances of his boyhood, he was a child prodigy. At the age of seven he composed Latin verses (which have been preserved), consoling his father on the loss of his little brother. Having entered the University of Leyden at the age of eleven—a fact which in itself did not mean too much at that time—he left it three years later after the delivery of public theses on mathematics, philosophy, and law; and in the meantime he had composed several poems in Latin and Greek and prepared an edition, published two years later, of an allegorical poem of the ancient Latin writer Martianus Capella. His fame spread so rapidly that when, at fifteen years of age, he was taken with a Dutch embassy to the court of Henry IV of France, the King is said to have pointed to him as “the miracle of Holland,” and the University of Orléans bestowed the degree of Doctor of Laws upon him. At the age of sixteen, he was admitted in his country to the practice of law; but he remained occupied with various pursuits in the field of humanities. When eighteen he wrote a Latin tragedy, *Adam in Exile*, which, as late as 1835, found an English translator. In 1603, preferred over noted scholars, he was appointed Historiographer of Holland.

Like Gentili and, later, Bynkershoek, he became concerned with the law of nations rather accidentally through a law case. It was a case of unusual implications and importance. In 1601, when the Netherlands were at war with Spain, a flotilla of the Dutch East India Company captured near Malacca a Portuguese ship, Portugal then being under Spanish domination. The ship with its valuable cargo was taken to Holland and sold there as a good prize. Stockholders of the company objected to this action on the ground that Christians must not wage war, and for other reasons of high principle. It seems that the company asked the young Grotius for an opinion on the objections, which he prepared in the winter of 1604 and 1605 under the title *On the Law of Spoils*.¹²⁷ Plunging deeply into the fundamentals, he vindicated the action of the company. A brilliant chapter of the

study was published in 1609, under the title *The Free Seas (Mare liberum)*; ¹²⁸ but otherwise Grotius refrained from publishing the essay, and it was not discovered until 1864. Still, he had familiarized himself with the law of nations and he had formed a definite, largely philosophical, conception of it. The substance of the essay went into his great work, but before that he had to pass through eventful and tragic years.

In 1607 he was appointed Advocate General of the Fisc of the provinces of Holland, Zeeland, and Friesland, thereby obtaining a distinguished and influential position somewhat comparable to that of an Anglo-American attorney general. Despite the heavy obligations of his new office he found time not only for widespread scholarly correspondence but for the composition of another religious tragedy, *Christ's Passion*, a work highly praised by contemporaries and later writers, as well as of a politico-historical study *On the Antiquity of the Batavian Republic*, ¹²⁹ a history of early Holland. It emphasized the age and venerability of the provinces and estates he served, and stressed the advantages of aristocratic government as represented by the patrician Dutch burghers. His argument indicated resistance to unification of the Netherlands, which, by an inevitable historical process, was then going on under the leadership of the House of Orange and was urgently required by the precarious international position of the country. This book, too, was a great success. As late as 1738 a translation into the vernacular proved necessary.

In 1613 Grotius was elevated to the even more prominent office of the Pensionary of Rotterdam, that is, the representative and negotiator of the second city of the Netherlands. In the same year he went to England as a member of a Dutch diplomatic mission. This was no success for him, personally or otherwise. Lack of prudent political judgment, shown on this occasion, was soon to prove fateful to him.

An attack by the Dutch theologian Arminius against the Calvinist doctrine of predestination, according to which the spiritual fate of man is predetermined by the Creator, led to a furious controversy which assumed political character. The Estates of Holland, which was the greatest among the United Provinces, proposed to settle the controversy by themselves—a procedure that would have favored the followers of Arminius because the aristocracy of Holland, which dominated the Estates, was predominantly inclined toward his teachings. Most of the other provinces, however, demanded a settlement through

a national synod where the orthodox Calvinists would prevail. Since the call for the synod tended toward national unity, it was supported by Prince Maurice of Orange who enjoyed a semimonarchical position. His political adversary and former friend Oldenbarneveldt headed the other party. Grotius favored the more liberal religious views of the Arminians, but the issue had now become primarily political. In this situation Grotius vigorously took the side of the Estates of Holland of which he, as Pensionary of Rotterdam, was an important member. Thus, he plunged headlong and without real awareness of the danger into one of the most critical struggles in the internal history of the Netherlands. When the Estates of Holland, with Grotius' prominent participation, took steps indicating preparation for civil war and negotiations failed, Prince Maurice struck. By a kind of *coup d'état* he caused the establishment of a special tribunal which in May, 1619, on purely political grounds, sentenced Oldenbarneveldt to death and Grotius to life imprisonment. Grotius was taken to the old fortress of Loevestein. As a prisoner he showed great strength of character. Having been allowed the use of books, he prepared, within the less than two years of his confinement, two works of lasting value: an *Introduction to Dutch Jurisprudence*, a textbook of Roman-Dutch law of such excellence that it has been used even in the twentieth century, especially in South Africa. The other fruit of his work in Loevestein was a pamphlet on *The Truth of the Christian Religion*. Designed primarily for seafarers, it was a popular explanation of the essential doctrines of the Christian religion as contrasted with the doctrines of other beliefs. This book became world-famous. Originally written in Dutch, it was translated into numerous languages, including Asiatic, and reissued again and again up to the nineteenth century. There were fourteen English editions alone.

In March, 1621, his imprisonment came to an end by an adventurous escape, the thrilling incidents of which have often been described.¹³⁰ Grotius had been permitted to receive from his friends and to return books in great number by means of a large chest. Grotius' wife, who was allowed to share his imprisonment, caused him to accustom himself to lying in the closed chest and then used a favorable time to have him removed in the chest to friends who made it possible for him to flee to Brabant in the disguise of a mason. From there he proceeded to France, where he was well received by the king and by friends. After preparatory studies begun late in 1622, and utiliz-

ing his essay of 1605, he wrote in 1623 and 1624 his great work *On the Law of War and Peace*,¹³¹ dedicated to Louis XIII of France. The Thirty Years' War was then raging in full fury. Grotius hoped to contribute to the restoration of law and peace through the persuasive power of his profound study, which tried to mobilize the forces of jurisprudence, philosophy, and theology—all of which were at his disposal. At the same time, being a refugee without a position, he might have thought of commending himself for public services.

His work met immediately with high praise. Nevertheless, Grotius had to enter a period of heavy disappointment and depression, particularly since his attempts at repatriation failed. After spending several years in Holland—rather furtively—and in Germany, he finally obtained a position adequate to his dignity and ambition. In 1634 the Swedish chancellor Oxenstierna appointed him Swedish Ambassador to Paris, honoring thereby the intentions of King Gustavus Adolphus (d. 1632), who had held Grotius' work in high esteem.

For more than a decade Grotius remained in that high position, doubly responsible because of the vicissitudes of the Thirty Years' War. However, he became more and more involved in theological problems, always with the reunion of the Christian churches as the goal before him. He also indulged in extensive historical inquiries, in poetry, and in far-flung correspondence with foreign savants. Except for revisions of his great work he did not return to international law; in some way the subject seems to have been peripheral to him. The numerous other publications of the last two decades of his life have not met with much praise, except that his annotations to the Gospels have been credited with introducing the historical-philological method into the exegesis of the Bible. Some of his later writings justly evoked unfavorable comment. This was true, for instance, of a short pamphlet on the origin of the American nations in which he advanced strange conjectures, indeed, in order to explain the repopulation of the earth after the deluge. As a result of the pamphlet he became implicated in polemics in which he fared rather badly.¹³²

Nor was Grotius successful as an ambassador. Despite his unrivaled authority as a jurist and a scholar, and notwithstanding the personal favor of the French king, he was unable to establish satisfactory relations with the French government, and Cardinal Richelieu repeatedly asked the Swedish government to recall him. He lacked the adaptability desirable in a diplomat. Moreover, he became so deeply absorbed

in his various literary pursuits and his struggle for the reunion of the churches that it was hardly possible for him to give full devotion to his office. An apocryphal anecdote is too characteristic to be omitted: at a reception for the ambassadors by the French king Grotius is said to have stood aside in a window niche perusing an interesting edition of the New Testament. The Swedish government indirectly expressed displeasure by sending a special negotiator to Paris to supersede Grotius, and finally, in 1644, recalled him.¹³³ In Stockholm he was treated with the greatest distinction, but no offer of another office was made to him. Without having secured new employment and without revealing his intentions to anyone, he suddenly left Sweden on a ship which was wrecked on the Pomeranian coast. Grotius, exhausted, tried to reach Lübeck in an open cart but got no farther than Rostock, where he died on August 29, 1645, having received final spiritual comfort from a Lutheran minister. Thus the great man passed away, alone in a foreign country, a physical wreck, and with his career shattered. It was the almost symbolic end of a deeply pathetic life. He had always felt an irresistible urge to shape, as a statesman, the destiny of men. Strangely, as a precocious boy, he had been anxious to establish, through well chosen dedications in his writings, contacts with politically influential personages. Still, in his innermost nature he was a scholar and an idealist, almost a dreamer. He lacked—the grave misfortunes of his life bear witness thereto—the gift of a realistic appraisal of facts and forces. Nothing is more characteristic than his passionate struggle for a reunion of the churches, a struggle which testifies to his religious fervor and his idealism but much less to his practical judgment. In fact, his efforts earned him only grave misunderstandings and bitter enmity. On his deathbed he is said to have uttered these words: "By undertaking many things I have accomplished nothing." So spoke the man who, by his profound and learned works, had given the world more than any other jurist or legal philosopher of modern times, if not of history, and upon whom his generation had bestowed so much of admiration and honors. His self-composed epitaph is truly stirring:

Grotius hic Hugo est, Batavum captivus et exsul
Legatus regni, Suecia magna, tui.

The "prisoner and exile"—this was a wound that hurt him until his last hour. Yet in defiance, as if to put his countrymen to shame, he

cried out in striking juxtaposition, "Ambassador of thy realm, great Sweden!" Thus, in a last effort, he tried to perpetuate the memory of what was among his imperfections. History has been fairer to Grotius than he was to himself.

HUGO GROTIUS: WORKS

Grotius' great work is essentially a treatise on the law of war,¹³⁴ the paramount concern also of his predecessors. Using a phrase of Cicero, Grotius chose the title *De jure belli ac pacis* (On the Law of War and Peace); but the law of peace is treated as incidental to the law of war rather than as coordinate with the law of war, which is the method of modern treatises on international law. The work centers in the traditional manner around the problem of just war. Following a much admired Introduction (*Prolegomena*) surveying his main views, the brief first book contains a disquisition on such basic concepts as law and war; the second book is devoted to an examination of the just causes of war, and the third book provides an exposition of "justness" in the actual conduct of war. More than half of the six hundred and thirty quarto pages fall in the second book, a considerable part of which deals with private-law topics, such as contracts, sales, interest, partnerships, torts, damages, and family relations, all of them treated in a speculative manner from the viewpoint of the "law of nature." Some points of municipal public law—constitutional and criminal—are included.

As a result, the work is composite and unbalanced. Particularly the private-law parts have very little to do with the law of war and peace. Grotius was aware of this fact; it accounts for the subtitle of the work, according to which "the principles of the law of nature and of nations as well as of public law are being expounded." Evidently the wide sweep of the subtitle is not in harmony with the main title. Grotius tried to justify the expansion of his program on the ground of the judicial theory of the scholastics. Avoiding its strangest feature, he does not ascribe the role of a judge to the victorious prince; but he does consider war as a kind of action for the vindication of violated rights. Hence, the examination of the just causes of war turns, in his hands, into a general examination of the just "causes of action." Grotius' explanation is farfetched. It has been surmised that the chapters on private law were taken from an earlier manuscript which, together

with the manuscript on the law of spoils, Grotius put to good use. This hypothesis is plausible; it may help to explain how Grotius could complete a work of such size and profundity in less than two years. Taken by themselves, the chapters on private law are by no means without merit. In Grotius' day the Roman law, generally considered on the Continent as authoritative, had not yet been adjusted to new conditions by legislation, much less by codification, so that there was a real need to have important matters of private law elucidated from the angle of "natural law," that is, of reasonableness. In attacking the task, Grotius had to enter a practically untilled field. That phase of his work, however, is outside the province of our inquiry.

With respect to organization and documentation, Grotius owes much to Gentili.¹³⁵ In substance and in method of argumentation, he is more influenced by the scholastics. Grotius has words of high praise for moral theology, and he frequently cites Vitoria. The fundamentals of scholastic doctrine are carefully considered in his work. In addition to the doctrine of just war which, as mentioned, underlies the whole plan of his treatise, such familiar concepts of the scholastics as divine law, natural law,¹³⁶ *jus gentium*, civil (municipal) law are thoroughly analyzed. Grotius inquires into their subdivisions, sources, mutual relations, and their common foundation, especially with an eye to the idea of justice. These and other parts of his tractate represent a general and broad philosophy of law. For our purposes we have to examine only a few major points.

The scholastics considered, we know, the natural law as divine.¹³⁷ Grotius, without contradicting them, nevertheless removes the natural law from theology by his famous statement that the law of nature would be valid even if "which cannot be admitted without utmost wickedness that there is no God or that human affairs do not concern him"—a pronouncement followed by a deeply felt confession of his belief in God. Daring scholastics before Grotius had sometimes used similar hypothetical phrases,¹³⁸ but only as dialectical artifices. Grotius' pronouncement must be understood, and it was understood, to mean that as a scholar he felt constrained to admit a possibility which was personally abhorrent to him, and which implied a mundane character of natural law. This character of his natural law is even more suggested by the fact that, following Aristotle without any theological twist, he bases natural law upon a psychological proposition, the sociability of man. This is why we may call Grotius' natural law the

rule of reasonableness. Little was left, therefore, in his system for a truly divine law.

On the other hand, the *jus gentium* was already considered as "human" by most of the scholastics, including Suárez. Grotius defines the *jus gentium* as a law *inter civitates* which now definitely means between states,¹³⁹ but he does not represent it like Suárez, as a matter of a few rules. Quite the contrary, he accords to the *jus gentium* a wide range in international relations, perhaps a wider range than to the law of nature. On the other hand he still uses the term sometimes in the old sense of universal law, without clarifying the distinction as Suárez had done.

The dichotomy of law of nature and of nations is in itself maintained by Grotius. He does have the notion of an all-comprehensive international law. In the first section of the "Prolegomena," where he states the main objective of his undertaking, he speaks of the law concerning the mutual relations among the several nations (*populos*)¹⁴⁰ or their rulers (*rectores*). This description encompasses both parts of international law as he views it; but he does not recur to it, much less try to condense it into a single technical term.¹⁴¹

Whatever the terminology, Grotius' international law as outlined above was in substance a unified whole, fundamentally different from the conceptions of the scholastics. While inspired by Christian ideals, it was secular to all intents and purposes. Just as in Gentili, the Pope and the Church had no legal position in his system. Still Grotius did not break with the scholastics. And while attributing great weight to the Roman jurists he did so only on the ground that they frequently offer the best reasons for the rule of natural law and furnish evidence in favor of that law and the law of nations. He did not rely, therefore, on the *Corpus juris* to such a degree as Gentili. To a far greater extent he relied on natural reason based on philosophy, tradition, and moral conviction.

With Grotius' secular approach his tolerance was closely connected. As has been seen, the Catholic writers of the sixteenth and seventeenth centuries thought of the Protestants as heretics—abominable enemies to be fought against with utmost bitterness. The attitude of Protestant writers was similar. However, Grotius, a pious Protestant writing at the time of the most savage of religious wars, refrained from any word which might offend Catholic feeling. This was not shrewd politics, but the expression of his desire and hope for the reunion of the Chris-

tian churches. In this sense he was nonsectarian or, perhaps, supra-sectarian. His tolerance went further: while recognizing a special bond among Christian powers, he was the first writer not to suggest discrimination against Saracens and other infidels; he considered even the conclusion of treaties with them as unobjectionable. And, aside from relations with non-Christians, propagation of the doctrine of international law could succeed only if it was acceptable, in substance and in form, to Protestants and Catholics alike. Here again progress beyond the scholastics, as well as Gentili, is manifest. In fact, tolerance is the outstanding feature of Grotius' work.

Grotius' doctrine of just-law again reveals his bent not only toward scholastic dialectics but toward the achievement of new and better results by shifts or twists of argument. On the one hand he includes private wars in his concept of war, as if conditions had not changed since the day of Thomas Aquinas. (This regression from Gentili might be explained by the fact that the belligerent action of a joint-stock company had been the starting point of his inquiry.) Also—again differing from Gentili—he agrees that as a matter of principle a war can be just only on one side. However, he points out, like Ayala, that justice is irrelevant with regard to the legal effects of a war. According to him, a war declared by public authority confers upon the belligerent parties, under the *jus gentium*, the right to harm the enemy regardless of the justness of their cause. This right in itself, however, is limited with regard to prisoners; they must not be killed nor, in a war between Christians, made slaves. Moreover, good faith must be kept toward the enemy in any case—a view in sharp contrast with Ayala, whose many objectionable exceptions he disregards. Grotius does maintain a certain significance of the “just-war” concept with respect to neutrality, as will be explained later, and to the rights of “conscientious objectors,” a matter of municipal law; but the belligerents themselves are now placed on the same footing, a rule readily adopted in actual warfare.

Another new turn which Grotius gave to the traditional just-war doctrine was no less significant. That doctrine, we know, was mainly concerned with the beginning rather than the conduct of war. There Grotius opened a new path by setting forth what he called the *temperamenta* of warfare. In a most persuasive manner, going extensively into details, he urged moderation for reasons of humanity, religion, and farsighted policy; for instance, the right to kill the vanquished

ought to be exercised only when it was necessary to save the victor himself from death or like evil, or when crimes had been committed by the vanquished; hostages should not be put to death unless they had done wrong themselves; property ought not to be destroyed except for reasons of military necessity; some liberty and autonomy should be left to the vanquished peoples, again especially in religious matters—and all this regardless of the justness of the cause of the vanquished.

Among the special issues whose discussion has been enriched by Grotius' inquiry, the freedom of the seas takes a prominent place. Grotius was the first to proclaim that freedom by elaborate argument. He did so with great skill, learning, and fervor. His study, of which the striking title *Mare liberum* is characteristic, was primarily aimed, as we have seen, at Portugal, which claimed sovereignty over the Indian Ocean; but the actual range of the controversy was much broader.¹⁴² Among his adversaries the most distinguished was the Englishman John Selden, who in 1635 answered *Mare liberum* with an essay under the equally challenging title *Mare clausum sive de dominio maris* (*The Closed Seas; or, The Dominion of the Seas*).¹⁴³ Selden's teachings became the acknowledged basis of official English doctrine for more than a century. Gradually, however, Grotius' thesis prevailed with governments and courts. The *Mare liberum* alone would have been sufficient to ensure him lasting fame.

With regard to embassies, Grotius introduced into the practice of international law the fiction, not unknown before, that the ambassador must be considered legally as outside the territory of the state to which he is accredited. The phrase used by Grotius in this connection, *quasi extra territorium*, was generally adopted, as was the doctrine of "extritoriality." In general, his statement of the law of embassies was progressive. In his opinion the ambassador was entirely exempt from the criminal jurisdiction of the receiving state; in the case of a grave crime, he might be compulsorily repatriated for punishment. These views have been recognized in international practice. As to civil jurisdiction, Grotius declared the movable property of the ambassador to be immune from seizure. Later, international custom pushed immunity in civil matters further, in consonance with the broad notion of extritoriality.

Surpassing Gentili, Grotius set forth a general theory of treaties, giving a much fuller account. For the first time treaties were distin-

guished from contracts, though they were still subordinated to a broader notion of contracts. In general, Grotius looked upon treaties made by a prince as binding upon his successors—an opinion more definite than Gentili's. Coming from a commercial nation, he furthermore rejected the *clausula rebus sic stantibus*, emphasizing the importance of good faith and the maintenance of treaties. But he felt the necessity of qualifying his position. Apparently he was willing to recognize the *clausula* where there was absolute certainty that the contemplation of the existing circumstances has been the *only reason* for the conclusion of the treaty—an unrealistic and artificial proposition. He also absolved the obligated state from its duty where this proved to be "too grave and unbearable."

Of great historic interest is Grotius' treatment of neutrality. He avoided the expression "neutrals," which was well known at his time but, has been pointed out, had an obscure significance in state practice. He preferred to speak in classical Latin of *medii in bello* (intermediates in war). He was virtually the first writer to subject the problem of neutrality to juridical analysis, but the time had not yet come for a satisfactory treatment. The bitter hostility of the religious wars of the period hampered the "neutrals" in observing an impartial attitude. At the same time, as was indicated, many of the smaller neutral rulers were unable to prevent a belligerent army from passing through their territories. It is here that Grotius proposed to impart legal significance to the conception of just war. The neutral, he felt, should do nothing to "support the wicked cause," suggesting thereby, much as Gentili did, the support of the "just" cause. By the same token, Grotius granted the righteous belligerent the right of passing through neutral territory and, in order to forestall the adverse party, the right of taking possession of places situated in that territory. This infusion of the just-war doctrine into the law of neutrality was later repudiated in state practice as well as in legal doctrine.

No doubt Grotius' merits have been exaggerated at times,¹⁴⁴ especially during the nineteenth century, when it was frequently said that he was the originator of the doctrine of natural law. This, of course, was a gross mistake. On the other hand, heavy criticism has been voiced,¹⁴⁵ much of it for good reason. His *On the Law of War and Peace* certainly does not form an integrated whole. The show of erudition is far overdone, and the reasoning is often ponderous and discursive. Another and striking defect—clearly the reverse of a vir-

tue—is the extent of Grotius' unwillingness to stir up adverse religious or political sentiments. In order not to get entangled in controversies turning on contemporary events, he confined his examples to ancient history and learning. This was not so strange in the era of humanism as it would have been in later times; but it remains a disturbing weakness of his argumentation. And bitter opposition has been aroused by his laborious proof that the people have no right to resist an oppressive ruler, and that a war against their oppressor is "unjust." In this matter Grotius fell victim to his conservatism and perhaps to his Calvinistic background, which would not allow rebellion against the "Christian state." Still, the point is somewhat remote from international law.

Perhaps one might find in Grotius' *On the Law of War and Peace* specific powers and weaknesses of old age—of a state of mind reached ahead of time by this precocious genius who, when a boy, had been characterized as a man without a childhood. It is noteworthy that the last two decades of his life indicate a decline of genuinely creative work and even a kind of ossification of personality leading sometimes to strange actions.¹⁴⁶

However this may be, *On the Law of War and Peace* made epoch in the history of international law. In fact, it initiated the doctrine of modern international law, which, we have seen, is bound to be secular and indiscriminate. Rightly, therefore, Grotius has been considered as the "founder" or "father" of international law.¹⁴⁷ He presented the new doctrine with a tremendous force of conviction. From the pages of his work the picture emerges of a man absorbed in his ideals, of a devout and profound seeker after truth and right, and of a passionate and unswerving advocate of humaneness and conciliation—a picture borne out by his life. The personal and spiritual factors explain the success of his undertaking.

This success was overwhelming indeed. There were almost fifty editions of the Latin original. The book was translated into Dutch, English, French, German, Swedish, Spanish, Chinese, and Japanese.¹⁴⁸ In 1661 a chair of the Law of Nature and of Nations was created at Heidelberg by the Elector of the Palatinate—remarkably in the philosophical rather than in the law faculty—for comment and elaboration on Grotius' teachings. Many other universities, both within and without Germany, followed, and a long series of treatises and textbooks on that composite subject was published in the spirit of Grotius' work. In the Protestant countries Grotius' fame became everywhere firmly

established. The same is true of France, where *Of the Law of War and Peace* first was published in the vernacular in 1687. In Italy his influence remained more limited. While the Spanish translation was not published until 1925, Grotius' early renown in Spain appears from the fact that Philip IV offered him a position. After the Peace of Westphalia his work served, in Rivier's phrase,¹⁴⁹ as "the European Code of international law," and its renown was not limited to Europe. The Latin American countries, from the time they became participants in international law, invariably held Grotius in highest esteem. The range of the translations indicates that even in the Far East he came to be regarded as an authority.

In 1626 the treatise was placed on the Index with the mitigating though practically insignificant proviso "donec corrigatur" (until amended). It was only in 1899 that this stigma was expunged. It accounts for the fact that the work was not quite as successful in the Catholic world (except in France) as in the Protestant. Characteristically, Italy's greatest legal philosopher, Gianbattista Vico (1668-1744) did not feel that he could as a Catholic yield to his desire to annotate the work of Grotius, whom he called *jurisconsultus generis humani*.

Grotius' fame was subject to fluctuations. During the greater part of the nineteenth century it was waning. The twentieth century witnessed a marked revival. When in 1915 a distinguished English association for the study of international law was founded, it naturally adopted the name Grotius Society. Again, when in 1920 the Allied Powers demanded from the Netherlands the extradition of the Kaiser they cited Grotius. In 1925 the tercentenary of *On the Law of War and Peace* inspired all over the world a tremendous number of publications; and this outburst seems to have stimulated rather than exhausted the interest in Grotius' work. Before entering the Second World War, the United States through its Attorney General (later Supreme Court Justice) Jackson, invoked Grotius in support of its discriminatory policies against Hitler's Germany; and it was invoked later for the prosecution of the war criminals. It matters little whether Grotius' views on these issues then represented the actual law of nations. To have Grotius on one's side in matters of international law is still an advantage. His work has remained a living force. He is no longer read as widely as in past centuries, but the essence of his thought has passed into the conscience of the civilized world.

CHAPTER V

From the Peace of Westphalia to the Napoleonic Wars

THE PEACE OF WESTPHALIA AND ITS SEQUELS; PEACE OF UTRECHT

The Thirty Years' War (1618–1648), probably the most devastating European conflict after the barbarian invasion, constituted the dominant event of the seventeenth century. It was at once the climax of, and practically the last of, the religious wars. The war was ended by the Peace of Westphalia after negotiations had dragged on for more than three years simultaneously at Münster and Osnabrück.¹ The great majority of the European powers were represented (England and Poland were among those absent), making the assembly the first European congress. To be sure, there was nothing like a presiding officer or committees or reports or other instrumentalities of a modern congress. Two places of negotiation were chosen primarily because France and Sweden quarreled on the question of precedence: France was made the first in Catholic Münster, and Sweden in Protestant Osnabrück. The Peace itself was signed at both places, the two documents legally forming one. France and Sweden guaranteed it. For at least a century the Peace of Westphalia remained the framework of Europe's political organization. Characteristically, important publications on the history of international law have taken the Peace of Westphalia as the starting point.² In fact, the Peace has sometimes been represented as the inception of the European law of nations. While this view is unwarranted, the Peace is a landmark in the development of international law.

In addition to the French and Swedish guarantees three features of the treaty are of particular significance.

First, the members of the Holy Roman Empire, more than three hundred, now officially had the right to enter into alliances with foreign powers—and consequently to wage wars—provided the alliances were not directed against the Emperor or the Empire and its peace,

or against the Peace of Westphalia—limitations difficult to enforce. They were thereby lifted to an international status approximating sovereignty though the old term *Landeshoheit* (territorial supremacy) was preserved. Culturally and economically the war had thrown Germany back more than a century. She had lost one-third of her population according to conservative estimates. To this the Peace added the irretrievable paralysis of the Empire's political might.

Secondly, the Peace brought forth the first international recognition of Protestantism—or, more precisely, of Lutheranism and Calvinism. This went beyond the Religious Peace of Augsburg of 1555. Catholics or Protestants who on January 1, 1624, had enjoyed the right of public or private worship were maintained in the right regardless of the religion which had been, or afterwards became, dominant in their respective territories. Those whose worship had not received official recognition on January 1, 1624, were granted "freedom of conscience" (*conscientia libera*) and protection of their civil rights, though in the hereditary lands of the Hapsburgs (Austria) toleration of Protestants remained more restricted. Secularization (confiscation) of monasteries and other ecclesiastic property was confirmed if it had taken effect on or before January 1, 1624. The Religious Peace of Augsburg, as was seen, had granted equal power to Catholic and Lutheran princes over the religion of their subjects; the Peace of Westphalia, while generally confirming that power, accorded protection to the religious affiliations of the individual. And whereas the Peace of Augsburg had been an intra-German affair, the result of a religious civil war, the new regulation was made a matter of international law through incorporation into a multipartite convention, the accession of Catholic France being of special significance. Pope Innocent X, by the bull *Zelo domus Dei*, declared the tolerance and other religious clauses, core of the Peace, "null, void, invalid, inequitable, unjust, condemned, reprobated, frivolous, of no force or effect"—a nullification extended to oaths taken under the treaty;³ but the treaty was carried out in all its parts. Just as there is spiritual nexus between Grotius' work and the Peace of Westphalia, so there is a similar nexus between the papal condemnations of Grotius' work and of this Peace.⁴

Mention should finally be made of the sanction added to the Peace. It calls for "perpetual oblivion and amnesty" of hostile acts committed in the past, so that all claims based on such acts shall be "buried"—phrases repeated in later treaties. In any violation of the treaty, it is

agreed, the offended party shall first submit the case to "amicable settlement or legal discussion"; and if it does not succeed within three years (*sic*) then all parties to the treaty "shall take up arms with all council and might in order to subdue the offender." Actually, such joint action never occurred, and was not even seriously considered; but the provision is historically important as the first attempt at international organization for the maintenance of peace.

The political status of the Western European countries was greatly changed by the Peace. Ascendancy among European powers shifted now to the France of Louis XIV (1643-1715). The French language became predominant in international negotiations to such an extent that it gradually replaced Latin as the customary means of communication among diplomats of different nationalities (an example, incidentally, of an international *usage* which was not international *law*).

Spain, which in 1641 had lost Portugal, had now, through a separate (Münster) treaty with the Netherlands, to accept the latter's independence.⁵ Moreover, her rigid and ill considered policies inhibited economic progress despite her precious American possessions.

England advanced to the second position among the European powers. To her the significance of the Thirty Years' War consisted mainly in her abstention from hostilities, a policy that enabled her to develop her sea power, to build up her colonial empire, and to gather economic and financial strength. At the same time England, in her successful fight against absolutism, was able to preserve her traditional ideal of the predominance of the law in public relations.

The Netherlands underwent developments in many respects similar to those of England. Although in two maritime wars with England (1652-1654, 1664-1667) the latter proved stronger, the growth of the Netherlands in sea power, in colonial expansion, and generally in wealth and culture continued during this period. In international law, public as well as private, the Dutch took the lead all over the world.

Basically, the structural pattern of Western Europe remained during this period that drawn by the Peace of Westphalia; but some changes must be mentioned. The Peace of Utrecht (1713) ⁶ ended the long drawn-out War of the Spanish Succession through the reciprocal renunciation by the French king of claims to the Spanish crown, and by the Spanish king of claims to the French crown. In addition to France and Spain, England and the Netherlands were signatories of

this Peace; but it was not multipartite as was the Peace of Westphalia, consisting of a number of bipartite conventions. The Peace gave England considerable advantages in the commercial and political fields (for instance, the possession of Gibraltar); and it terminated the hegemony of France, exhausted by the wars of her king. In fact, the Peace proclaimed that "the peace and tranquillity of Christendom may be restored by a just balance of power [*justum potentiae equilibrium*], which is the best and most solid foundation of mutual friendship and of lasting accord." Balance (or equilibrium) of power means a political condition among states under which none wields a power so superior as to imperil the political independence of the other.⁷ To put it differently, there would be no hegemony, and until the Napoleonic period the political situation was more or less in accord with this postulate. However, the diplomatic game became more complicated with the emergence of a new Western power: Prussia, a kingdom since 1701, won prominence under Frederick the Great (1740–1786), having defeated Austria as well as France. Furthermore Russia became a leading European power under Peter the Great by the Peace of Nystad (1721). At the same time Sweden was shorn of her dominant position in the north of Europe. The loss on the Protestant side, however, was more than offset by the rise of Prussia and by England's tremendous colonial and commercial expansion. Through Russia's ascent, the relative share of the Catholic states in the total of political power was further diminished, though France preserved her preeminence, perhaps more on the basis of her culture than on the basis of her military strength.

THE FRENCH REVOLUTION; THE NAPOLEONIC WARS

The foremost political event of the period occurred within national boundaries: the French Revolution. It inaugurated a new era of legal development in France as well as in countries which came under French influence. All branches of municipal law were heavily affected. International law⁸ was touched as the result of an ideology which, unlike that of the American Revolution, was fundamentally one of world revolution. The revolutionary conceptions found radical expression in the Declaration of the Law of Nations (*Déclaration du droit des gens*) which was submitted in 1795 to the French Convention by a ranking member, the constitutional bishop—better known

as "Abbé"—Grégoire.⁹ The Declaration was intended to parallel the Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'homme et du citoyen*) of 1789: a parallelism which was inspired, as will be seen, by the eighteenth century natural-law doctrine. Characteristically, Abbé Grégoire, in the first article of his Declaration, affirms the "state of nature" existing among nations and the universal morality which is their bond. He then proceeds to develop the corollaries in twenty articles, including the inalienability of the sovereignty of each nation; the right of each nation to organize and change its government; the recognition of an attack upon the liberty of one nation as an offense against all other nations; the subordination of the interests of the individual nation to the "general interests of the human race"; and other, mostly high-flown and vague, tenets. The Convention, afraid to commit itself to such an extent in a perilous foreign situation, disposed of Grégoire's proposals by passing on to the order of the day after a few brief remarks from the floor; a later attempt by Grégoire to have his Declaration included in the printed records of the Convention likewise failed.

The National Assembly of 1789 and later the Convention, however, had themselves proclaimed some broad principles of natural-law pedigree, which Grégoire had incorporated in his Declaration: the renunciation of wars of conquest and of attacks upon the liberty of other nations,¹⁰ and the profession of the principle of nonintervention.¹¹ This profession, it is true, is somewhat contradicted by another announcement of the Convention which declares France the friend and natural ally of all free nations¹²—a view which actually provided a stronger incentive than did the principle of nonintervention. The propaganda value of the declarations in the then existing political situation of France is obvious. More impressive was the attitude of the National Assembly in the annexation of the papal enclave of Avignon. Though a revolution in Avignon had done away with papal rule, the National Assembly repeatedly rejected annexation, which was decreed in September, 1791, only after a favorable plebiscite.¹³ The idea of the plebiscite—an application of the democratic majority principle—was later practically abandoned by the Revolution, but its introduction into the processes of annexation remains a great accomplishment. One must remember that this was the era in which princes sold their soldiers like so many horses.

The Convention contributed to the law of war by a decree of May

25, 1793, providing, under the condition of reciprocity, for the same hospital treatment for wounded and injured enemy soldiers as that accorded to French soldiers, as a matter of "justice and humanity";¹⁴ but the decree seems to have had little effect because of the reciprocity requirement.

The Provisional Executive Council of the Republic, in April, 1792, when France had occupied Belgium, decreed the opening of the Scheldt, which had been closed by the Netherlands on the authority of the Münster Treaty. The Council declared the opening to be required by "the principles of the law of nature," but only in favor of the riparian states.¹⁵ From the law of nature one could have just as well deduced that the Scheldt should be open to all nations, including England. The action of the Council amounts probably to the most conspicuous practical application of the natural-law doctrine.

To what extent the general transformation of political ideas wrought by the Revolution has *indirectly* influenced international law, is not easy to say.¹⁶ The higher conception of the dignity of man, as evolved in the Revolution, probably accounts for the disappearance in the nineteenth century of the repulsive business and familial transactions by princes over state territories or subjects. Also, it is believed that the consummation of the French national state, with its emphasis upon the rights and duties of citizens, with its symbols and slogans, gave strong impulses to the wider and more precise use of the nationality concept in private international law and in various international regulations. And of course the effects of the nationality concept and of other revolutionary ideas upon international developments of a purely *political* nature were much more far-flung and pervasive.

The Napoleonic period (1799–1815) restored French hegemony for a short time, at least over continental Europe, a hegemony which found its most conspicuous expression in the establishment of satellite states such as Westphalia and Naples. A lasting effect of Napoleon's victories was the formal dissolution in 1806 of the Holy Roman Empire, by the abdication of its last emperor, Francis II. Thus, princes and free cities heretofore legally under imperial power were made sovereign in terms of juridical theory and thereby became full-fledged personalities of international law.

In the Napoleonic Wars¹⁷ little respect was exhibited for international law, and this applies not only to Napoleon. A noteworthy ex-

ample is the blockade of the European continent from the mouth of the Elbe to Brest as declared by the English government in 1806. Though the English fleet ruled the seas after Trafalgar, it was beyond its power to invest "effectively" all the ports and coasts involved as was required by the dominant doctrine on blockades. To England's action Napoleon retaliated by instituting what is generally known as the "Continental Blockade," a set of measures designed to strangle English commerce. Owing to the weakness of the French fleet, this "blockade" had to be carried out mainly on the Continent; it is therefore more accurately termed "Continental System" by English historians. It violated accepted rules of international law at least toward the neutral powers, which were cut off from their legitimate commerce with England. Through new reciprocal countermeasures by the belligerent parties, pressure upon neutrals was further increased. Another famous deed, hardly in accord with accepted doctrine, was the English bombardment of Copenhagen in 1807, resulting in the surrender of the Danish fleet, a measure taken because the government had been informed of a secret clause in the Franco-Russian peace treaty of Tilsit according to which Denmark should be compelled by France and Russia to close her ports to English ships and to join the war against Great Britain—information which in no way incriminated the Danes.¹⁸ (It is an encouraging fact that some English writers have criticized this action.) Among Napoleon's violations of recognized neutral prerogatives, the abduction of the Duke of Enghien from the neutral territory of Baden to France in 1804, followed by martial procedure and execution, was perhaps the most notorious.

THE OTTOMAN EMPIRE

The relations of the Ottoman Empire to the European countries remained on the whole under the regime of the capitulations.¹⁹ In fact, owing to Turkey's ever weakening power of resistance, her sovereignty was further emasculated. In 1740 Louis XV of France succeeded in obtaining a new capitulation which was a real code of eighty-five articles, and surpassed everything granted before by the Sublime Porte. To mention some details, European nations having no ambassadors of their own at the Sublime Porte were now officially placed under French protection; French precedence among ambassa-

dors and consuls was reaffirmed; French rights in the Holy Places were considerably expanded; customs duties were in a sweeping way fixed at 3 per cent (of course, only on the Turkish side); etc. This was the last arrangement to be called officially "capitulation"; the unilateral form disappeared thenceforth.

Formal treaties were concluded by Turkey, but they, too, were unfavorable to her. The treaties were the outcome of defeat which the Turks had suffered in their wars with Western European powers, especially with Austria and Russia, over the possession of Hungary and the Balkan countries. The Peace of Passarowitz between Austria and Turkey (1718) was mainly concerned with territorial concessions to Austria, but was followed by a treaty of commerce in the same year related to such matters as freedom of trade, customs, consular rights, shipwreck, and piracy (which is another early instance of commercial treaties being separated from political ones). While Austria received practically all the rights possessed by capitulatory powers, the Sublime Porte was granted at least the right to appoint for the Austrian territory consuls without jurisdictional functions. The Ottoman Empire's protracted and bloody conflict with Russia was ended in 1774 by the Peace of Kuchuk Kainarji. This treaty also was followed by a commercial agreement, concluded in 1783.²⁰ It granted to Russian nationals the most extensive privileges; but as other nations had protected, or would protect, themselves by most-favored-nation clauses, their nationals participated in the new concessions. The treaty of 1783 became thereby a basic legal document for foreign commercial relations of the Ottoman Empire. The Peace of Kuchuk Kainarji itself proved far more lasting and momentous than the Peace of Passarowitz. It gave to the Czars for the first time a certain legal basis for intervening with the Sublime Porte in matters of the Orthodox Church. Literally taken, the treaty could be interpreted, at most, as giving the Russian ambassador the right to make "representations" in matters of the Christian (Orthodox) religion²¹ to which the Sublime Porte promised "to pay attention"; but according to Russian interpretation it was a grant to Russia of an exclusive protectorate not only over Russian travelers in Turkey but over the numerous Orthodox subjects of the Sultan, a pretension bound to provoke grave international consequences.

During the eighteenth century the Sublime Porte concluded commercial treaties also with Sweden (1737), Prussia (1761), and other

powers, all of whom obtained the right to have consuls with judiciary functions in Turkey. After the beginning of the seventeenth century agreements of the capitulary type were entered into by France with Morocco, and with the semi-independent barbaresque states also. Other powers were less active in these areas.

COUNTRIES OUTSIDE EUROPE

In the Far East conditions did not change much with respect to international law. Japan, protected by her insular position, maintained her seclusion without great effort. China's resistance to contacts with foreign powers took the form of arrogance²² and humiliating demands; superiority of Chinese civilization, or rather non-existence of any other, was asserted; foreign negotiators were required to perform before the Emperor or his representative a definite number of ceremonious prostrations (kowtows), which, in connection with the expected gifts or tributes, were considered by the Chinese as evidence of Chinese suzerainty. It was only in the nineteenth century that the stubborn attitude of the Chinese was broken.

Limited agreements, however, were obtained in the seventeenth and eighteenth centuries by Russia, whose expansion over Siberia had brought her into close contact, and conflict, with northern Chinese territories.²³ In 1689 a Chinese-Russian agreement was concluded at Nerchinsk (near the Manchurian border), under which the Russo-Chinese frontier was opened for trade on the basis of reciprocity. Elaborate extradition rules were added. Nationals of one country, having committed a crime in the other, were to be extradited to their own country for punishment. (Under modern treaties the culprit is extradited to the country where the crime has been committed.) Persons who had left their country without permission were likewise subject to extradition (an arrangement found we know, in early antiquity). In 1727 the Treaty of Nerchinsk was replaced, after a bellicose conflict, by the Peace of Kiakhta (south of Lake Baikal), which, apart from frontier regulations, followed the lines of the earlier convention. However, a permanent legation as well as the admission of four priests of the Orthodox church was conceded to the Russians, and exercise of the Orthodox faith was permitted. The expulsion, ordered a few years earlier, of Catholic missionaries from China, gives point to that agreement. In 1733 a Chinese embassy was sent

from Peking to Moscow—a singular event in Asiatic diplomacy and a matter of great wonderment. No similar contacts were established with the Western powers, but the relations with Russia, too, remained narrowly restricted. On the whole, seclusion persisted during the entire period.

Internationally, by far the most important event outside the European area took place at the end of the period: the rise of the United States of America. Not only was an important nation of Christian civilization added to what was called the family of nations, but the new commonwealth, inspired, under the guidance of Benjamin Franklin, by ideas of cosmopolitan liberalism, exhibited from the beginning a particular propensity for international law. The “law of nations” was accorded a conspicuous place in the Constitution of 1787, which empowers Congress “to define and punish . . . offences against the law of nations” (Art. I, sec. 8, cl. 10), and declares treaties made under the authority of the United States the “supreme law of the land” (Art. VI, par. 2). Even before the adoption of the Constitution several international agreements were concluded by the United States, among them the “Treaty of Amity and Commerce” of 1785 with Prussia, signed on the American side by Benjamin Franklin and on the Prussian by Frederick the Great—in diplomatic history, probably the most striking expression of the spirit of Enlightenment.²⁴ We shall discuss some aspects of the treaty later, as well as certain novel features introduced into state practice by the early governments of the United States.

STATE PRACTICE: (A) PEACE

State practice of this period differed strikingly from that of the preceding one—the picture looked definitely happier, at least until the Napoleonic Wars. Not that the religious tensions had disappeared. Treaties between Protestant and Catholic countries remained rare, and they had to do in part with the settlement of problems originating in the diversity of faith; but the tensions were no longer acute enough to lead to bloody contests. Absolutism was in full bloom, and the political field was dominated by the discord of dynastic and national interests. Diplomacy, and often petty diplomacy, had its heyday. Its tasks were greatly complicated by the existence of numerous minor potentates or *Landesherrn* striving for the preservation of their

precarious independence. Since, under such conditions, diplomacy clearly could not proceed according to the theory of equality of the rulers, ceremonial problems concerning titles and precedence of princes and envoys in official meetings, in correspondence, and in treaty signature—important already in earlier periods—became increasingly a matter of irritation and controversy and, added to by pomp and ostentation, reached the point of ridicule. J. J. Rousseau spoke caustically of congresses “where one deliberates in common council whether the table will be round or square; whether the hall will have more doors or less; whether one or another plenipotentiary will have to sit with his face or with his back towards the window; whether another will have to advance in a visit two inches more or less, and a thousand questions of like importance.”²⁵

The necessity for permanent embassies, however, was no longer a matter of controversy. Russia joined the system of permanent embassies under Peter the Great (1682–1725). The title of “Excellency” came to be customarily accorded to ambassadors. A peculiar practice was followed by the Sublime Porte.²⁶ From the sixteenth century on, the Sultan had admitted permanent ambassadors of foreign powers though they were long subjected to heavy and even humiliating restrictions; but until late into the eighteenth century he did not appoint ambassadors himself; in special cases he would send temporary envoys of lesser rank. The underlying pretense of superiority contrasted with a decay that was only too evident.

After a long silence one hears again during this period about consuls. The policies of “mercantilism,” aiming at state initiative for the promotion of industry and finance, favored the export trade. For that purpose, expansion and vitalization of consulates commended itself. It is therefore not surprising that the French *Ordonnance touchant la marine* (1681), the work of Louis XIV’s great mercantilist minister, Colbert, included an elaborate regulation of the consular office. In the past the appointment of consuls had been largely in the hands of commercial corporations. Consular offices were even salable. These conditions were now done away with. The *Ordonnance* made the consuls government officials subject to strict government rule, a system later adopted by other powers. The place of the new consular provisions in the *Ordonnance*—a codification of public maritime law—and their emphasis on the judiciary functions of the consuls, pointed to the older Levantine type so important to France, although the

language of the *Ordonnance* was elastic enough to serve France as the legal basis of her consular institutions until modern times. Nevertheless, the significance of consular activities remained rather limited during this period.

In treaty practice confirmation by oath definitely disappeared.²⁷ A French-Swiss alliance of 1777 presents the last instance of such an oath. Invocation of God or, between Christian powers, often of the Trinity remained customary, however, in the preambles of important conventions.

Treaties of the medieval type, by which a prince in one way or another might dispose of his territory, are still found. The absolutist regime brought about an even worse confusion of public and private law, as witness the maneuvers of German princes who actually and shamelessly sold their subjects into foreign military service in the form of military arrangements.²⁸ This matter is sufficiently known from the Hessian and other German auxiliary troops used by England in the American Revolutionary War.

A characteristic type of international agreement in this period had to do with the protection of religious minorities. There had been precedents in the Byzantine-Persian treaty of 562 and in the capitulations; but the new regulations, related primarily to Protestants and Catholics, had a greater importance.²⁹ The pertinent provisions of the Peace of Westphalia set a pattern used later, especially by Louis XIV in the multipartite Peace of Ryswick (1697), for the protection of the Catholic faith in territories ceded by France. Protection of the Greek Orthodox was included in the Austrian-Polish treaty of 1773, which formed part of the First Partition of Poland.³⁰ Still, protection remained restricted to the main Christian denominations; in fact, the Peace of Utrecht stipulated the exclusion of Moors and Jews from ceded Gibraltar. The first unlimited expression of tolerance is found in a convention of Protestant powers, the commercial treaty between the United States and the Netherlands (1782) which granted the "most perfect freedom of conscience and of worship" to all subjects of the other party. That provision reappears in the American-Prussian treaty of 1785.³¹ Protection of religious minorities gave way later to the protection of national minorities.

In the field of international commerce mercantilism found its foremost English version in Cromwell's Navigation Act of 1651.³²

The Act generally restricted importation to goods brought to England in English ships, except that European products might be carried in bottoms belonging to nationals of the producing country. The Act was primarily directed against the Netherlands, but its notions governed English policy for two centuries. It sheds some light upon the validity of the conception of "freedom of commerce" under international law; more affirmatively, the Act is related to international law in that it forms the background of later English treaties relaxing its harsh provisions.

Commercial treaties—by no means incompatible with the mercantilist system—spread in this period over the greater part of Europe; Russia and Austria, particularly, joined in the practice of the Western countries. Political and commercial conventions became more clearly differentiated. In this respect the example was set at Utrecht in 1713 when, in addition to the political convention between England and France—the core of the Peace—a commercial treaty between them was concluded. This treaty is further noteworthy because it contained a full-fledged "most-favored-nation" clause, by which each party guaranteed to the other all advantages conceded or to be conceded to a third state. The clause caused the British Parliament to reject the treaty. It was only in 1786 that a new commercial treaty (Eden treaty), embodying the most-favored-nation clause, was entered into by the two powers. An earlier convention, the Methuen Treaty of 1703, between England and Portugal played a role in this development: Portugal undertook then to permit the importation of English cloth, and England obligated herself to levy upon Portuguese wines no more than two-thirds of the customs duties imposed upon French wines. The treaty—styled after its English negotiator, Lord Methuen—technically supplemented older treaties of commerce between the two countries. It remained in force for more than a century, deeply influencing Anglo-Portuguese relations, and English foreign policies in general. In fact, the English rejection of the commercial convention of Utrecht was based on the allegation that its most-favored-nation clause ran counter to the Methuen treaty. In the Eden convention, Portugal's preferential position was reaffirmed.

Some progress was made toward the establishment of fixed customs duties to be levied at the frontier and toward the elimination of inland customs. In this respect, the French tariff of 1664, introduced by Colbert against heavy resistance, was a signal achievement.²³

A dark chapter of the period is the trade in Negro slaves.³⁴ Early in the sixteenth century Spain had organized the supply of Negro slaves for her American colonies. Highly paid-for licenses (*asientos*, or contracts) for the importation of definite numbers of Negro slaves were granted to entrepreneurs who procured the "merchandise" from African hunters of black men. Most of the entrepreneurs were non-Spaniards. This disgraceful business was lifted to the level of international law when England obtained from Spain under the Peace of Utrecht a monopoly for the importation of slaves through a special agreement—the Asiento Convention—and transferred that monopoly to the South Sea Company. The execution of the Asiento Convention, however, led to grave friction with Spain, and in 1750 the English monopoly came to an end. Treaty organization of slave trade began as early as the Byzantine-Russian treaty of 911; but the convention of 1713 was far more reprehensible. In 911 the slaves were supplied by a pagan nation, and there was no comparable organization.

Piracy was clearly considered as a distinct and heinous crime in this period. By the end of the seventeenth century English statutory law developed a differentiation, later adopted by the United States, between "piracy *jure gentium*," meaning approximately robbery on the high seas by private vessels, and "piracy by statute," meaning similar acts (e.g., committed by rebel ships) considered as piratical according to particular acts of legislation.³⁵ In the first case the courts were ostensibly directed to apply the "law of nations" as such, though in reality they did so in the light of English conceptions. But at least the idea was that piracy *jure gentium* should be punished as "international crime" everywhere and wherever encountered. In fact, the growing strength of navies and the progress of armament during the period resulted in the extinction of piracy in the Western world, whereas privateering (by "corsairs") became a well organized and flourishing kind of maritime enterprise. The evil practices of the North African barbaresque states offered a special problem; namely, whether the barbaresque robbers could be punished as "pirates" despite the cooperation of their rulers. Such a renowned jurist as Bynkershoek answered the question in the negative.³⁶

Decline of arbitration continued until the Jay Treaty of 1794, by which England and the United States engaged to dispose of certain unsettled issues of the Anglo-American Peace of 1783. On the initiative of the former American Secretary of Foreign Affairs, John Jay,³⁷

after whom the treaty is commonly called, several arbitration clauses were incorporated in the compact. The most important was concerned with claims for damages sustained by English and American citizens, respectively, through the capture of ships or through other confiscatory acts by the enemy government. For the purpose of arbitration each government had to appoint two commissioners, while the chairman, in the absence of a majority vote, was to be chosen by lot. This Commission worked from 1799 to 1804, rendering five hundred and thirty-six awards and originating some important precedents; for example, it was decided that, in case of doubt regarding their powers under the treaty, the arbitrators themselves had to determine the ambit of their jurisdiction (a reasonable rule, which, however, may expose such award to the objection of nullity on the ground that the arbitrators actually exceeded their powers). The Commission also assumed competence to set aside judgments of national prize courts.

The Jay Treaty was progressive not only because it revived the idea of arbitration; it took the further step of establishing a continuing arbitral tribunal for a whole group of claims. There, again, the United States contributed to the improvement of international law.

STATE PRACTICE: (B) WAR

After the gruesome experience of the Thirty Years' War, armed conflicts changed their character for a while. The rising absolutist regimes needed standing armies. In war this meant that the haphazardly mustered, undisciplined soldiery of old that lived widely from plunder and extortion was replaced by professional soldiers subject to harsh discipline. These soldiers were not easily "expendable"; the cost of the military establishment was high, and methods of financing were crude and wasteful.³⁸ What princes aspired to in peace and war was expansion of their power over new lands and subjects; the earlier religious fervor, bent on annihilating the adversary, had vanished. The common people were little affected by these dynastic interests, particularly as they were not expected to mingle in public affairs. Wars were affairs of the governments only—"cabinet wars." Thus political conditions offered a propitious field for the humane ideals of the Enlightenment. Their development came to a head in the latter part of the eighteenth century. The American-Prussian

Treaty of 1785³⁹ stipulated, for instance, that in case of war between the two powers not only were women and children to be provided for, but "scholars of every faculty, cultivators of the earth, artisans, manufacturers, fishermen, and all others whose occupations are concerned with the common subsistence and benefit of mankind, shall be allowed to continue their respective employment and shall not be molested." Merchants were to be allowed nine months for collecting their debts and for settling their affairs before freely departing to their homes "with their effects." Merchant vessels "rendering the necessities, conveniences and comforts of human life more easy to be obtained" were to be permitted to pass free and unmolested. Elaborate provisions, foreshadowing the Red Cross Convention, pledged humane treatment of prisoners of war. Though these rules were in part adopted by the Jay Treaty and other conventions of the period, they were on the whole too unrealistic for survival.

Perhaps the most amazing feature of warfare in those days was the ease with which private persons traveled from one belligerent country to the other. Laurence Sterne, who went to France in 1763, comments casually, "I had left London with so much precipitation that it never enter'd my mind that we were at war with France"; he reached Paris without having a passport and had friendly contacts with French "people of culture," including army officers.⁴⁰ And as late as 1813 the famous English chemist Humphry Davy traveled in France for several months during the war and was treated with the greatest distinction;⁴¹ while this visit had been permitted by Napoleon, it was an extraordinary event if contrasted with later developments.

Also, the first vestiges of international care for soldiers in the field became visible. Organized medical care for them had slowly and sporadically emerged from the sixteenth century, especially in France. It became more common in the eighteenth century.⁴² During the seventeenth and eighteenth centuries this trend was reflected in military agreements which, in the case of a capitulation of a fortress, city, or military unit, provided for a certain protection of the sick and wounded.⁴³ Similar though more limited provisions are found at the end of the seventeenth century and throughout the eighteenth as incidents of military "cartels," that is, in arrangements between military commanders for the exchange and ransom of prisoners of war; in a few cases the cartels took the form of conventions between the warring rulers themselves. A main concern of the cartels was to

secure refund of the expenses to the army which, as a result of military events, had taken care of wounded and sick enemies. The provisions of the cartels varied greatly. Ordinarily, wounded and sick enemies had to be sent back to their army as conveniently as possible; until then they were accorded the right to be cared for by surgeons of their army and by their own servants, a regulation apparently meant for higher officers. Hospitals were sometimes exempted from confiscation by the enemy. Particular praise for humaneness has been bestowed on a cartel of 1743 between the English General Count Stairs and the French General Duc de Noailles. Its main merit was that it guaranteed the inviolability of military hospitals.

Ransoming still flourished; in fact, there developed a kind of tariff, fixing ransoms according to the rank of the prisoner. Again France exhibited a particular refinement in this matter. In an Anglo-French agreement of 1780 the ransoming price of an ordinary soldier was fixed at twenty-five francs; the price of a Maréchal de France, at fifteen hundred francs.⁴⁴

The problem of neutrality attained crucial significance in this period, with respect to maritime warfare. After the Peace of Westphalia the Netherlands, "Wagoners of the Seas," possessing a larger commercial fleet than all the other nations put together, were able to improve their neutral position by a number of treaties embodying the rule "free ships, free goods." This meant that enemy goods, except contraband, on neutral (Dutch) ships must not be captured, though neutral goods on enemy ships—the Dutch were in little need of foreign bottom—were not protected. These rules spread widely over the Western countries by way of agreements until the eighteenth century. Whether in the absence of an agreement the old prescripts of the *Consolato del mare* still prevailed is not clear; apart from the treaties the law was rather obscure. France stuck long to the harsh principles of the *Ordonnance* of 1543, which were incorporated into the *Ordonnance touchant la marine* of 1681 but served mainly as a bargaining point.

Regarding contraband national decrees prevailed, but treaty regulations were issued on several important occasions, especially in the Peace of the Pyrenees between France and Spain (1659) and in the Peace of Utrecht. On the whole, the concept of contraband remained restricted during this period to goods directly destined for warfare

though naval equipment was often treated as contraband without further ado.

The fact that, during the eighteenth century, England gained incontestable supremacy on the high seas was bound, of course, to influence the law of neutrality. When in the Seven Years' War (1756–1763) the English navy prevented French ships from reaching overseas possessions, Dutch ships, with French consent, took over the trade with the French colonies as “neutrals” though in peacetime they had been barred from it. England, however, declared the Dutch ships to be good prize under those conditions (rule of 1756).⁴⁵ Somewhat later, and again in English practice, the celebrated “doctrine of continuous voyage”⁴⁶ evolved from the following typical situation: cargo was first taken by a neutral ship to the neutral port X, where the cargo was unloaded and then reloaded and shipped, perhaps together with other goods, to the belligerent's port Y. In such a case, the journey to X was legally considered as part of a “continuous voyage” to Y, with the question of “contraband” being decided on that hypothesis. While the doctrine of continuous voyage was later extended to other situations, thereby raising intricate problems, there is little doubt that either rule was basically justified and indicative of a fair use of English sea power. This may generally be said of the practice of the English Prize Court. One of its judges, Lord Stowell, won fame even outside England for his lucid opinions.⁴⁷

Resistance of neutrals against English naval supremacy asserted itself in various events pertinent to international law. The so-called case of the Silesian Loan is an instance.⁴⁸ In 1744–1748, during the War of the Austrian Succession, the English captured and condemned Prussian ships and cargoes, treating grains and naval stores as contraband of war, contrary to the Prussian view which had been approved in oral statements by the English Foreign Minister. In order to enforce Prussian claims for damages, King Frederick the Great stopped payment to English bondholders on the “Silesian loan,” which had been contracted by Emperor Charles VI but had been taken over by Prussia after the conquest of Silesia. The dispute ended in a compromise. While bearing on neutrality, it is interesting also from the viewpoint of international finance. As a matter of fact, in the twentieth century the debtor position of a country was skillfully employed as a weapon of grand diplomacy against creditor nations, especially by Germany's National Socialist government.

More important, Russia made in 1780 her first conspicuous move in the field of international law, inaugurating a new phase of neutrality through a declaration joined in the same year by Denmark and Sweden and later by other powers.⁴⁹ The declaration—actually the work of the Danish Minister Count Bernstorff,⁵⁰ one of the foremost diplomats of his day—proclaimed freedom of navigation for neutral ships, even along the coasts of belligerent nations. It adopted the rule, “Free ships, free goods,” and required “effectiveness” of blockades. These principles were represented as already recognized by the law of nations, but the legal argument was supplemented by the language of force. It was understood—and intimated in the declaration—that neutral merchantmen were to be convoyed by men-of-war ordered eventually to enforce the treaty rules (“armed neutrality”). Sweden, in 1653, had been the first to use the convoy system as such, expecting the belligerents—England and the Netherlands—to take the presence of the men-of-war and proper assurances by their commander as sufficient guaranty of the legitimacy of the merchantmen’s trade and to dispense with “visit and search.” Though her example had been followed by some other powers, the expectation had not been realized. The more ambitious armed neutrality of 1780 was equally unsuccessful, owing to England’s opposition; and, remarkably, in 1793 Russia reversed her policy and joined England, in order to cut off revolutionary France from supplies through neutrals. A second “armed neutrality” of 1800, again arranged by Russia in conjunction with Scandinavian and other maritime countries, fared no better. Still, the views underlying the armed-neutrality compacts were to some extent recognized in bilateral treaties and also influenced the developments of general international law.⁵¹

More than by international arrangements, the law of neutrality was promoted in the later part of the period by edicts of neutral powers. Edicts of Tuscany, Naples, and other Italian states during the American Revolutionary War⁵² barred hostilities within cannon range of shore and tried, through minute regulations, to prevent the use of neutral ports by belligerent ships as a basis or point of attack; they more or less permitted the building and outfitting of ships for belligerents, but prohibited neutral citizens from enlisting on the ships of belligerent nations. Such decrees helped to clarify the position of the neutral state in a given conflict and to evolve standards of neutrality. More important was the American Neutrality Act of 1794,

another of the early American contributions to the development of international law.⁵³ The elaborate enactment placed the emphasis upon neutral duties, which were rigidly defined. Any enlisting of American citizens or residents in foreign military or naval service, or outfitting or arming of vessels for belligerent foreign powers, was prohibited. The statute was occasioned by actions of the French Minister Plenipotentiary, which violated United States neutrality; though somewhat overstrict, it was inspired by a high conception of neutrality and won the praise of foreign statesmen and writers.

The position of neutrals was also affected by the right of angary,⁵⁴—the right of sovereigns to impress foreign ships into their service—exercised mainly by belligerents against neutrals, but of a general and ill defined character. The word “angary” (of Persian origin) was used in the *Corpus juris* for requisitions of various kinds, but not for the requisition of ships, actually practiced in antiquity as well as during the Middle Ages and the sixteenth century. The idea of a particular right, based on international law, to requisition foreign ships took shape under the ancient name in the seventeenth century. It was widely resorted to throughout the period, especially by Louis XIV in his wars. In legal doctrine each and every phase of the right was controversial: whether it was recognized by international law at all; if so, what was its legal basis (*jus necessitatis*, eminent domain, sovereignty); what were its prerequisites; whether it include the right of impressing the crew into the service of the requisitioned ship; whether the requisitioning government was liable to pay compensation and, if so, to what extent. From the seventeenth century on, treaties exhibited a growing tendency to abolish the right of angary. Whether it survived was, none the less, long a point of controversy. In World Wars I and II the right of angary was amply employed; but it was limited to property, and the obligation to indemnify was recognized.

Outside the maritime sphere not much can be said about the law of neutrality. The “balance of power” and the resulting jealousy and suspicion among the powers encouraged even weak neutrals to resist arbitrary interference, and especially the alleged “right of passage.” Some treaties still granted passage, but at least Switzerland was generally able to resist such infringements prior to the Napoleonic Wars, affirming thereby her status of neutrality.⁵⁵ In any case, this was the last period of the alleged right of passage.

DOCTRINAL DEVELOPMENTS

Religious antagonism was no longer the determinant in the struggle of contesting theories during this period. Natural law itself, as was seen, had undergone a Protestant interpretation through Grotius. In the eighteenth century it became associated with the great movement of the Enlightenment, which strove to liberate thought from the shackles imposed by the Church and by the absolutist regimes, and to establish the rule of reason. Thus, the law of nature became more and more imbued with revolutionary tendencies. Abbé Grégoire's Declaration is an instance. The American Declaration of Independence (1775) likewise appealed to the law of nature.

On the other hand, the eighteenth century witnessed a fundamental and successful reaction against the law of nature and related ideas of "natural" philosophy. The countermovement was led by the British empiricists, particularly by David Hume (1711-1776), but these developments form part of the general history of philosophy and science.

The doctrine of international law was affected by the movement only in a limited way, and more indirectly. As a matter of fact, during the period no one among the writers on international law flatly repudiated the law of nature. Nevertheless, one can draw a line between "naturalists," who still emphasized it, and "positivists," who emphasized treaties and custom, pushing the law of nature into a subordinate position or outside the law proper, or else neglecting it altogether. The reasoning of the positivists was more juridical and more related to concrete situations, whereas that of the naturalists was more philosophical and abstract. Some historians of our day distinguish further between (pure) naturalists and "Grotians." The differentiation does not recommend itself, for in Grotius' system the law of nature is a dominant element; besides, Grotius was authority also to the positivists. However, a small but powerful third group of writers turned altogether against the notion of a legal bond between nations—the deniers of a "law of nations" in the broad sense.

Grotius' bifurcate *jus naturae et gentium* fell slowly into disuse during the period. Hobbes (1588-1679), as we shall see, was the first to make *jus gentium* (omitting *naturae*) the exclusive denomination for the law obtaining among nations. In the eighteenth century the

use of *jus gentium* with its translations (law of nations, *droit des gens*, *Völkerrecht*) in the sense indicated became firmly established. Sometimes one also encounters *droit public de l'Europe*, which in itself has a broader meaning. Bentham invented the term "international," as one of his happiest linguistic innovations, in his *Introduction to the Principles of Morals and Legislation* (1789). It is especially felicitous because it lends itself easily to derivatives. Perhaps something like "interstatal" would have been more exact—if one assumes with Kant that the law of nations (*Völkerrecht*) ought to be called the "law among states." Evidently there is in the term "international" a residue of the old nomenclature, which in our day has more or less disappeared except in the German-speaking countries, whereas, surprisingly enough, Bentham's term has won exclusive currency in Italy and Spain. The counterpart of "international" (jurisprudence), Bentham called "internal"—a denomination which, along with "national," "domestic," and "municipal," came to replace in this field the old terms of "human," "civil," and to some extent of "positive" law. The use of "municipal" in this sense is an English peculiarity. The original Latin meaning of *municipium* as a town has been expanded in the English derivatives since the sixteenth century into a broader conception, which seems to have become accepted through its adoption in Blackstone's famous *Commentaries on the Laws of England* (1765).

In a striking way, all the leading authors after Grotius were Protestants. This condition persisted during the first decades of the nineteenth century, causing von Kaltenborn, the first historiographer of international law, in 1847 to declare international law "a Protestant science." The explanation must be sought in part in the papal condemnation of Grotius' work, which was the basis of learning and teaching in the field. The difficulty of reconciling the idea of a modern international law with the crucial position of the heresy conception in Catholic dogma must also be taken into account.

Important issues on the law of peace and war confronted the writers of the period. The fundamental question appeared to be: To what extent is the law of nations a matter for the ordinary law courts, which, after all, are institutions of a national character? We have seen that seventeenth century English courts were inclined to fall back on

international law in the definition of "piracy." The eighteenth century witnessed a broader approach to the problem. In a case decided by Lord Talbot in 1737⁵⁶ occurs the view first suggested by Gentili's later teachings, that the law of nations is "the law of the land"—viz., a part of the law of England.⁵⁷ Supported by Lord Mansfield and by Blackstone, that view became a settled canon of English law. At first, it meant not much more than the recognition of foreign authorities and of the relevance of foreign state practice in matters of the law of nations—for instance, the immunity of ambassadors. This was a generalization and transformation of the customary practice of the Law Merchant which was likewise considered as a part of the "law of nations."⁵⁸ The view introduced by Lord Talbot marked, within the area of international relations, a departure from the insular tradition of the common law, which recognized only indigenous customs and authorities—a tradition different from that of the civil-law countries, where, because of the kinship of their legal systems, it was easy and natural to rely on foreign legal authorities. In the following centuries, the Talbot rule was applied and further elaborated by the courts of the United States, whose Constitution, as we have seen, declared treaties "the supreme law of the land." More recently, the basic idea of the rule has become the focus of a keen jurisprudential controversy.⁵⁹

Another far-flung problem was raised by the reference in the Treaty of Utrecht to the "balance of power." This is in itself a very old, if not pristine, notion of politics. It may apply to larger or smaller geographical areas containing a plurality of states, for instance, to Europe or to Italy; in fact, the term—suggesting the rise of the science of physics—was invented by a writer on Italian history, Francesco Guicciardini (1483–1540). Aimed at the preservation of the *status quo*, balance of power constitutes a principle of high diplomacy. The use of the phrase in the Peace of Utrecht simply amounts to a commendatory official comment and, perhaps, to an interpretative rule applicable to this particular treaty. Apart from that rather singular reference, balance of power may be related to international law through the concept of just war (would war for the maintenance of the balance be "just"?), or, to the equally precarious idea of lawful intervention (would intervention be lawful for such purpose?). Writers of the period occasionally touched upon the former question.

In reality, the conception of balance of power is not a legal one, though unconvincing attempts at juridical treatment were undertaken in later periods.⁶⁰

The law of embassies kept its prominent place in the literature. Probably the most consulted book in the field was the *Mémoires touchant les ambassadeurs et les ministres publics* (1676), later styled *L'Ambassadeur et ses fonctions*, by De Wicquefort, a scheming Dutchman in the diplomatic services of some minor German potentates. The author's origin and employment, his use of the French language, and his emphasis upon ceremonial and anecdote were all typical of contemporary diplomacy.

A smaller segment of the monographic literature of the period is connected with the spread, in the eighteenth century, of commercial conventions. In 1767 Bouchaud, professor of the Law of Nature and of Nations on the Paris law faculty, published the *Théorie des traités du commerce entre les nations*. Though of limited value and rarely mentioned by historians of international law, the book is of historical interest because of its new subject matter as well as the fact that it constitutes the first contribution by a French writer to the science of international law.⁶¹ Bouchaud's study is entirely in the manner of the law-of-nature school. The provisions of commercial treaties are deemed to confirm the duties arising under the natural freedom of commerce; and the illustrations are taken largely from antiquity and from the Scriptures—certainly not a desirable source of light on commercial matters. Tariff questions receive scant consideration.⁶² The bulk of discussion is devoted to maritime law, a further indication that this was a time when world trade still depended mainly on the sea lanes.

The ever growing expansion and intensification of treaty relations accounts for the beginning, in the eighteenth century, of systematic collection of treaties on a world-wide basis.⁶³ While several collections of national, or of otherwise limited, scope appeared in the seventeenth century, in 1693 the versatile German philosopher Leibniz, started the publication of his *Codex juris gentium diplomaticus*. It constituted a first, and necessarily imperfect, venture.⁶⁴ Decisive progress was made in the Netherlands, where some enlightened publishers with the collaboration of the learned theologian Jacques Bernard, a Huguenot refugee, began issuing in 1700 the *Recueil des traités du paix, etc.* This was later continued by Dumont as *Corps universel diplomatique du droit des gens*. It contains treaty material

from A.D. 800 on; even today it forms the outstanding source of information for the time up to 1738. In 1791 G. F. von Martens started the publication of his *Recueil des principaux traités*, which (under various titles, but preserving von Martens's name) has remained the chief collection up to the present. The value of these collections for the positivist method in international law is manifest.

As a work on international law, mention is sometimes made of the *Droit public de l'Europe fondé sur les traités*, published in 1747 by Abbé de Mably, one of the forerunners of the French Revolution. Still, Mably's treatise is in no way concerned with legal analysis; it is a politico-historical study of the more important peace treaties from the Peace of Westphalia, together with a chapter on commercial treaties of the same period. It met with considerable success and went through several editions. The author emphatically advocates the proposition that war ought not to affect the freedom of maritime commerce, a postulate certainly more in accord with French than with English interests. Though the study lacks documentation, it is one of the first attempts at methodically utilizing the new treaty collections.

Regarding the law of war, a new approach of fundamental significance was made by J. J. Rousseau. While he did not carry out his plan to write a treatise on the law of nations, he enriched the theory of international law by the idea set forth in *Le Contrat social* (1762),⁶⁵ that "war is not a relation between man and man, but a relation between state and state in which individuals are enemies only accidentally, not as men, or even as citizens, but as soldiers; not as members of any particular community, but as its defenders." This notion, as seen, was favored by political conditions in the era of the cabinet wars, and even of later times. It was widely accepted during the nineteenth century by public opinion, statecraft, and legal theory, and it exerted a favorable influence upon warfare; among others, it was professed by William I of Prussia at the beginning of the Franco-German War in his Manifesto of 1870, to wage war "with the French soldier and not with the French citizens."⁶⁶

The law of neutrality, so significant and controversial in state practice, was naturally a favorite topic of writers. A substantial number of monographs in point were published during the eighteenth century. Three of them may be mentioned.⁶⁷ Written by authors be-

longing to politically weaker countries, they strongly sponsored the case of the neutrals. Martin Huebner, a Danish diplomat of German extraction, in his *Traité de la saisie des bâtiments neutres* (1759) goes to an extreme indeed by asserting that any neutral ship should be treated as neutral territory, and that in prize cases a belligerent could not claim jurisdiction over neutral goods lest he become judge in his own case; instead Huebner advocates prize courts composed of representatives of the belligerent and the neutral power. These views, supporting the policies of Huebner's superior, the Danish Minister Count von Bernstorff,⁶⁸ had no chance of adoption in state practice and were questionable as to theory. Nevertheless, Huebner's work is of great value. He tries to bolster his argument by reference to precedents, treaties, and what he considers to be reasonable requirements of enlightened state practice. He relies neither on the law of nature nor on the writings of the naturalists. His study, therefore, is probably the first monograph in the positivist manner. It also constitutes a landmark in the history of neutrality law, partly because of its method, partly because Huebner represents neutrality as a status with definite rights and duties, and especially with the obligation to work for the restoration of peace—a conception which tends to impart to neutrals a greater dignity. And of course he defends the freedom of the seas.

Another remarkable monograph, written in Italian by the Abbé Galiani, a Neapolitan of French culture who is better known as an economist and a littérateur, is *The Duties of Neutral Princes Towards Belligerent Princes*,⁶⁹ published in 1782. This work, prepared at the behest of the Neapolitan government, criticizes Huebner's hypothesis that a neutral ship is a part of neutral territory, but shares Huebner's view to the extent that it objects to the capture of enemy goods on neutral ships; in prize cases it advocates jurisdiction by the neutral power over neutral ships. Giovanni Maria Lampredi, a Tuscan citizen and professor at Pisa, writing in Italian on *The Commerce of Neutral Nations in Times of War* (1788),⁷⁰ takes a different view; he considers the principles advanced by the *Consolato del mare* as a proper basis of prize law, and believes the jurisdiction of the captor state to be justified on historical grounds. Both Italian authors are swayed by the conception of natural law which, yielding equally good reasons for the belligerent and for the neutral, proves embarrassing to Lampredi as he tries to build up his argument in a strictly juristic way. In fact, his "naturalism" is qualified; he includes in his inquiry a

careful examination of treaties and decrees, of which he reproduces pertinent examples. Galiani, on the other hand, indulges in semi-philosophic oratory in the manner of the French school of the later eighteenth century. Moreover, he is given to excessive polemics. Yet his discourse does not lack brilliance or ingenuity. Thus, Galiani ably refutes the usefulness of the distinction between "aggressive" and "defensive" wars. Unfortunately, his theological background causes him indiscriminately to confound points of morality and even of prudence and decency with legal arguments. For instance, starting from the question—illustrative of the neutrals' weakness—whether a state is *entitled* to remain neutral, he answers in the negative where the state owes its existence to a donation, or to another act of magnanimity on the part of a belligerent who is now waging a "just" war. The state, he asserts, would otherwise incur the "dishonorable blame of outrageous ingratitude." The whole controversy on neutral rights brings home the unsettled methods of the literature of international law in the eighteenth century. The use of the vernacular by Galiani and Lampredi is characteristic of an ascendant trend in the international-law literature of the later part of the period.⁷¹

To private international law, always a subject closely related to property interests, the growing wealth and commerce of Western Europe gave fresh impetus. Again, the contribution of the Netherlands was preeminent. The Dutch school of thought, represented primarily by Paul Voet (1619–1677), his son Johannes (1647–1714), and Ulrich Huber (1636–1694), drifted away from the interlocal or interprovincial approach characteristic of both the Italian and the French Statutists, into an international approach. Proud of the newly won independence of their country the Dutch writers, utilizing the teachings of Bodin, proclaimed for each sovereign state full legal freedom in the recognition or nonrecognition of the laws of foreign states and of the rights acquired thereunder; but at the same time they declared it sound policy to grant such recognition as a matter of *comitas gentium*—that is, courtesy and expediency—in order to secure reciprocity and thereby to contribute to the welfare of all concerned. While preserving the distinctions and argumentative methods of the Statutists, the Dutch writers inaugurated an evolution which made private international law essentially a matter of domestic law, and finally led to the result that there were as many "private inter-

national laws" as there were independent states. However, these laws developed along cognate lines in the countries of the European continent and later within the range of Western civilization. To the extent that the Dutch doctrine stressed expedience rather than legal obligation as a basis for the recognition of foreign laws and rights, it was largely abandoned in later doctrine, which rested that recognition on legal principles. Still a remainder of Dutch thought survived in the accepted view that foreign rules incompatible with domestic "public policy" (*ordre public*) are precluded from application by the courts.

Speculations about a political reconstruction of Europe for the purpose of perpetual peace continued. An interesting project of this type was published by William Penn in 1693,⁷² after he had acquired fame through his peaceful administration of Pennsylvania. In contrast to the earlier planners, and especially to Sully, Penn wished to include the Muscovites and the Turks in the proposed federation, for whose Supreme Council (Diet) he contrived an elaborate parliamentary structure and proceeding. The votes of the delegates in the Diet were to be determined by objective yardsticks; namely, by the yearly revenues or the foreign trade of the various states. The typically Anglo-Saxon features of the project are unmistakable.

Probably the best known scheme for perpetual peace is the *Projet pour rendre la paix perpétuelle en Europe* (1713), by the Abbé de Saint-Pierre.⁷³ Like William Penn, the Abbé de Saint-Pierre did not propose a redivision of Europe. He wanted to perpetuate or eternalize the *status quo* on the basis of the Treaty of Utrecht, in the preparation of which he had participated in a modest secretarial position. According to him, the Christian states should form a federation for the prevention of foreign as well as of civil wars; the federation would also guarantee the existing forms of government—certainly a feature attractive to the various potentates of the period. Similarly, as in earlier projects, a permanent assembly of delegates of the federated sovereigns, to be known as the Senate, would be the supreme authority. In the case of disputes the Senate would decide; a recalcitrant party would be forced into submission by war. War as a means of coercion was also envisaged as the ultimate weapon against a minority of states unwilling to enter a federation agreed upon by a somewhat qualified majority. In the Senate only the greater states would enjoy a vote; the smaller states had to vote in groups with one

vote for each group. Regarding the inclusion of non-Christian powers in his project, the Abbé advanced different ideas at various times.

The quaint scheme came into being in a period given to speculations on sweeping measures for the attainment of a better world; and this was particularly true of France, which, not without reason, felt called upon to lead humanity upon this path. Throughout his life the Abbé was a keen and persistent propagandist for his peace plan. He was on vantage ground because he came from an old noble family and held a distinguished ecclesiastical position at the French court; he also was a prolific writer and for a time a member of the Académie Française, from which he was most honorably banished for having criticized Louis XIV's absolutist regime. His peace plan, inspired by the best of intentions, was received with due respect, but the general response was one of mild irony which the good Abbé did not always perceive. A controversy which he had in his eighties with Frederick the Great is indicative of his astounding vigor and his repute, though also of his simplicity. As Crown Prince, Frederick had published an essay, "Anti-Machiavel," stressing among other things the ruler's duty to keep peace. When Frederick, after his ascension to the throne, invaded and conquered Silesia, the old Abbé in a pamphlet, *Enigme politique*,⁷⁴ besought him to confess guilt and to submit his case to Anglo-Dutch arbitration rather than to insist upon his conquest. Surprisingly, the King took this naïve suggestion seriously enough to have it rebutted by an anonymous pamphlet, probably prepared by the French scholar Formey, under the title, *Anti-Saint-Pierre; ou, Réfutation de l'énigme de l'Abbé de Saint-Pierre*. But the Abbé did not give up. He tried to convert the King by letters concerning which the King wrote to Voltaire that the Abbé de Saint-Pierre "honors me by his correspondence," and that his "peace plan is very practical but for the fact that it needs for its success the consent of Europe, and some other bagatelles." In recent times the plan has been extolled, even more than earlier schemes, as foreshadowing the League of Nations.

With the various plans of world reconstruction for the sake of peace, writers frequently associate Immanuel Kant's essay, *Toward Perpetual Peace* (1795).⁷⁵ Kant is there concerned with a critical evaluation of the conception of perpetual peace, which he thinks is not a chimera but a goal attainable by a long process of gradual approximation under certain conditions defined by him, conditions that are all within human power. Some are prohibitive or negative; for

instance, there should be in the making of peace treaties no mental reservation of pretensions conducive to new wars; standing armies should be abolished. Other conditions are affirmative. For instance, the civil constitution of each state should be republican—which meant to Kant essentially the separation of the executive from the legislative power; and the law of nations should be based upon a confederation of free countries. It is the latter proposition that primarily accounts for the literary association of Saint-Pierre and his predecessors with Kant. However, Saint-Pierre and the others delight in fancying a new world created and depicted by themselves, without bothering much about the real significance and inherent limitations of such an undertaking. Kant proceeds in just the reverse manner. He wisely refrains from any attempt to expatiate upon the structure of the future confederation (if any); he merely points out that a confederation of free states would be a prerequisite of perpetual peace. In a measure, his superior reasoning amounts to a confutation of what one might call the “dreamer” school of international political planning.

DENIERS OF INTERNATIONAL LAW

Not two decades had passed since the appearance of Grotius' *On the Law of War and Peace*, with its high tribute to the ideals of international law, when exactly the opposite view—namely, the absence of any legal bond among nations—was set forth in a most impressive manner by the English philosopher Thomas Hobbes (1588–1679),⁷⁶ in *Philosophical Rudiments Concerning Government and Society*,⁷⁷ better known under the Latin title, [*Elementa philosophica de cive* (1642)], and, more elaborately, in his *Leviathan* (1651).

Hobbes starts from the old notion of man's pristine “state of nature.” With him this notion, which was theological in origin, takes the form of a prime state of man outside society—a theoretically conceived condition in which the idea of organization is discarded so that it becomes possible (allegedly) to observe the operation of man's original or innate qualities. In this state of nature, Hobbes thought, men are actuated only by strife for more and more power. Hence, they are engaged in a war of every man against every man, in which all are equal because even the weakest may kill the strongest, and aggression is just as legitimate as defense. However, the basic urge to self-preservation suggests, where use is made of

right reason, a more farsighted course conducive to peace and security, man's deepest desire. It is from this individualistic and social instinct, rather than from a superior moral command, that the "law of nature" flows—a misleading term, as Hobbes admits. His law of nature is not a law properly so called; it denotes conclusions on how to act for self-preservation and defense.

The state of nature comes to an end when men, limiting their natural liberties, unite through the social contract to form a state; that is, obligate themselves to obey a sovereign—everyone on the condition that the others do the same. Thereby a single authority is created which will bring about peace and security for the individuals by absolute and irrepressible force. The sovereign's will is the law, and this is a real law, in contradistinction to Hobbes's "law of nature."

Outside the organized community, however, the state of nature, or war of all against all, persists. This is especially true of relations among sovereigns because they do not live in such a community. Hence, "brutal rapacity," characterized by deceit and violence, prevails among them. They are "in continual jealousies and in the state and posture of gladiators; having their weapons pointing and their eyes fixed upon one another." Still, the so-called law of nature—the enlightened desire for self-preservation and defense—operates also among sovereigns (states); in this particular application, Hobbes calls it *jus gentium*, again disregarding the original meaning of the term. That operation is illustrated by what Hobbes has to say on the significance of contracts in the state of nature. He asserts that, under his law of nature, promises in "contracts" are binding only where the promissor has received performance or at least "some benefit" from the other party. (Apparently and amazingly, this is an attempt to represent a technical rule of the English common law as an element of his natural law: namely, the rule that an informal contract requires a "consideration" to make it valid.) Still, the binding force, if any, of the promise does not mean much in the state of nature, and this is the important thing. The binding force obligates primarily *in foro interno*, that is, it operates as a desire to keep a promise. *In foro externo* it operates only where it can be kept in safety; namely, where there is reasonable certainty that all others concerned will equally abide by the contract. Besides, the promise will also be kept out of pride or out of fear of the evil consequences of a breach. On principle, however, "covenants without the sword are but words." All this is theoretically set forth

for *any* "state of nature"; actually, Hobbes envisages nations and their treaties.

Hobbes's remarks touching on international relations are only incidental to his philosophy of state, and rather perfunctory. Yet, pronounced with the unique vigor and poignancy characteristic of his style, they have greatly and in various ways influenced the doctrine of international law. Hobbes was the first to reserve the term "law of nations" (*jus gentium*) for application to international relations. This is more than a matter of nomenclature. Because actually individuals live in states and are therefore subject to the law in the proper sense of the word, Hobbes indirectly makes it a point of his political philosophy that sovereigns in their reciprocal relations follow determinants of a different type; namely, those of his law of nature. The Suarezian-Grotian division of *jus naturae* and *jus gentium* is done with; *jus gentium* is merely a part of (and actually identical with) *jus naturae*. The latter law, and therefore also the *jus gentium*, is christened "divine" law by Hobbes because God gave men reason; but this is manifestly one of the verbal concessions toward dominant powers which the violently anticlerical skeptic deems necessary. The essential derivation of his law of nature from the naked and untrammelled self-interest of the individual is antichristian and clearly secular. In this sense Hobbes's doctrine is in accord with the secular character of international law. His stress on equality among the subjects of the law of nature and of nations is likewise a feature of historical significance. While his cool and indiscriminate alignment of aggression and defense flies in the face of scholastic teachings, his argument, taken as a whole, is an almost classical expression of the ever recurrent feeling that international law is no more than an inane phrase. However, his systematic approach and the profundity and exactness of his reasoning place his work far above Machiavelli's cynical comments on state affairs.

A doctrine similar to that of Hobbes was set forth by Benedict (Baruch) Spinoza (1632-1677).⁷⁸ Though Spinoza's fundamentally moralist approach differs widely from Hobbes's system, he agrees that states naturally live in a condition of hostility, and that a treaty is valid only so long as, in the opinion of the covenanting parties, the reasons for which the treaty was made still persist; the weal of the citizens, to safeguard which is the state's reason for existence, must prevail over treaty obligations. From a practical point of view, there-

fore, Spinoza's conclusion is not much at variance with that of the English philosopher.

Hobbes's and Spinoza's conceptions in this matter were not accepted by later writers of the period. The era of the Enlightenment, with its cosmopolitan bent, was favorable to the hypothesis of an international law. Not until the nineteenth, or more definitely the twentieth, century were doubts regarding the existence of such a law revived.

THE NATURALISTS

Among those who tried to derive a law among nations from the commands of natural law, the German, Samuel Pufendorf (1632–1694),⁷⁹ must be mentioned first. Pufendorf was the son of a Lutheran minister. Upon completion of far-flung philosophical, legal, and historical studies, he entered in 1658 the service of the Swedish ambassador in Copenhagen. Following the outbreak of hostilities with Sweden, the Danish government threw Pufendorf and other members of the ambassadorial staff into prison. During the eight months of his captivity Pufendorf—one is reminded of Grotius—wrote a brilliant study, published in 1660, *On the Elements of Universal Jurisprudence*,⁸⁰ which contained in bud the tenets of his later work. Thereupon, the Elector of the Palatinate in 1661 appointed him the first incumbent of the new chair of the Law of Nature and of Nations at Heidelberg, a position which, as was mentioned, carried with it the obligation to expound Grotius' teachings. In 1670 Pufendorf accepted a similar professorship at the University of Lund, Sweden, and in 1672 he published his main work *On the Law of Nature and of Nations*,⁸¹ a formidable volume of more than 900 pages in large quarto, an abridgment of which appeared in 1673 under the title *On the Duties of Men and Citizens*.⁸² The main work, carrying on one of the two chief phases of Grotius' *On the Law of War and Peace*, constitutes a kind of *Corpus juris naturalis*, a counterpart, as it were, of Justinian's *Corpus juris civilis*. Unfolding the conception of natural law, it covers, in a systematic fashion, the whole range of law, public and private. In 1677 Pufendorf withdrew from academic life to become Swedish Historiographer and Privy Councillor. In 1688 he went to Berlin to take a similar position with the Great Elector of Brandenburg and the latter's successor, Frederick III. Until his death Pufen-

dorf displayed a comprehensive literary activity, mainly in history and political science.

As appears from this survey, international law was just as little a subject of primary interest to Pufendorf as it was to Hobbes or Spinoza. Within the field of jurisprudence his chief work was on the law of nature, and the law of nature as applied to internal rather than to international relations. Pufendorf gives the law of nature a new secular twist, inasmuch as he finds it to a great extent embodied in the civil law; namely, in so far as the latter conforms to reasonableness and equity. The rest of the civil law is simply "positive." Through this approach Pufendorf places himself in the position of a critic or reformer, actual legislation now being gauged by the standard of reasonableness. As a devout Protestant, Pufendorf admitted the law of nature to be derived from God; he even refused to accept Grotius' contrary hypothesis. Practically, however, his work is so little influenced by theological or religious sentiment that he came to be considered as the true founder of a secular law of nature. With the scholastics he had no patience; few exceptions apart, he refused to take cognizance of what he called their "petty syllogisms [*rationcola*], falling in with the songs of the realm of darkness." No wonder that his work was placed on the Index; but it was also severely censured by orthodox Protestants.

Regarding international law Pufendorf stands midway between Grotius and Hobbes. Like Hobbes, he reserves the term *jus gentium* for international relations; the former universal-law aspect of *jus gentium* is in Pufendorf's conception covered by that part of civil law which conforms to the everywhere invariable natural law. Again he agrees with Hobbes that there is no law among nations except natural law. However—here he turns away from Hobbes—his natural law is not a complex of essentially biological urges. It is the old moralist natural law of the scholastics, and even more of Grotius. By combining such heterogeneous elements Pufendorf arrives at the unfortunate idea that there is no independent *jus gentium* at all, and that jural relations among nations can be found only in natural law. We have seen that Suárez somewhat belittled the part of *jus gentium* in international relations; but such a narrow, one-sided "naturalist" view as Pufendorf's was never taken before or after. Pufendorf in fact sets out to prove that every rule actually observed among nations is nothing but law of nature. He tries to show this, for instance, in respect to the

immunity of ambassadors, yet he fails to derive from natural law helpful rules in this intricate matter. First, he states that the ambassador is free from the jurisdiction of the receiving state; but he adds that the immunity may be rightly disregarded by the prince where the ambassador is more intent on seeking out the secrets of the foreign state than on the preservation of peace. Pufendorf apparently supposes the prince to be the only judge in this matter. Obviously, his idea is destructive of the whole immunity principle. No attempt is made by him to enter into the more technical and highly important details of ambassadorial immunity.

Nor would Pufendorf recognize rules of positive international law in respect to custom ("tacit agreements") or express agreements restricting the cruelty of war; these agreements he declares "repugnant to nature" and therefore void. He uses a weak argument giving as an example the agreements between Italian *condottieri* which purported to spare the lives of their precious mercenaries. More important, Pufendorf dismisses treaties of any kind as immaterial in the theory of international law. They form, he asserts, no more a part of the law itself than ordinary contracts between individuals form a part of private law. They are simply facts, hence "objects which history claims for her own."

These tenets did not bear fruit in the development of the theory of international law, and they gave later writers an easy target for criticism. They are interesting primarily from a historical point of view as an extreme example of the doctrinairism innate in the natural-law school. However, it is misleading to call Pufendorf, as is frequently done, a "denier of international law." His natural law, which he believed to control international relations exclusively, was—though not clearly separated from morality—conceived as a legal order superimposed upon men and nations by a higher power. In his system the rejection of the *jus gentium* is nominal only.

A historically more important contribution by Pufendorf to the history of international law may be found in his insistence upon the natural equality of states. This idea is traceable to Hobbes, with whom equality was a feature of those living in the state of nature; but Hobbes conceived it rather as a biological quality, though in its implicit application to "sovereigns"—that is, to states—it assumed a jural flavor. Owing to Pufendorf's different conception of the law of nature, the equality of states became practically a legal idea. Chal-

lenging contemporary practices, he rejected all claims to precedence and suggested that precedence among members, individuals or states, of any given organization should depend on the time when each member was admitted to it—a theory, of course, highly pleasing to his Electoral patron.

On a number of other questions Pufendorf followed in Grotius' footsteps completely, reiterating familiar issues and controversies of the just-war doctrine. Perhaps one may mention as a new point his opposition to the doctrine of natural liberty of trade, which was one of the weaker spots in Vitoria's teachings.

All in all, Pufendorf did not add much to the science of international law. While he is generally considered as a "Grotian" or "post-Grotian"—he was in his day called "the son of Grotius"—this characterization is questionable in view of his treatment of international law. Here Hobbes's influence was deeper. Pufendorf's true merits and successes relate to other fields. His main work, a bold and almost exuberant undertaking, remained for a century the authoritative exposition of an essentially secular law of nature. His reliance on reason, his unorthodox attitude in matters of religion, his emphasis upon equality, his critical attitude toward the existing law, and other progressive notions which included a courageous attack on the by-the-grace-of-God theory of monarchy, made him an early representative of the Enlightenment, and he was so recognized by the French Encyclopedists of the eighteenth century.⁸³ He also won lasting fame by demonstrating in a stirring pamphlet the organic weakness of the Holy Roman Empire. Though his stature does not match that of Grotius or Hobbes, he was a powerful figure in the intellectual history of the seventeenth century. As with Suárez, this fact was instrumental in favorably coloring the judgment on his achievements touching international law.

Contrary to Pufendorf, Christian Wolff (1676–1756),⁸⁴ another German representative of the Enlightenment, took a particular interest in the law of nations. Wolff, too, started from theology, but an encyclopedic urge led him early to the study of philosophy, mathematics, physics, medicine, botany, economics, and law. His particular conception of enlightenment bore a Frederickian stamp; he was the convinced advocate of enlightened absolutism as represented by Frederick the Great who, when a successor to the Prussian throne,

was taken by him as the model of a "philosopher king." Though Wolff did not share Frederick's indifference toward religion, he was, in the very spirit of the Enlightenment, opposed to zealotism and not even averse to the idea of "natural religion." In a public address in 1721, as a professor at the University of Halle, as well as in later writings, he created a sensation by pointing to Chinese conditions and rulers as exemplary. Soon he became involved in a bitter fight with the Protestant orthodoxy, which was very powerful at Halle. The dispute was brought to the attention of the "soldier king" Frederick William I, who, in 1723, suddenly ordered Wolff to leave Prussia within forty-eight hours on pain of death on the gallows. The inside story of this astounding order has never become known; probably Wolff's theological adversaries had succeeded in misrepresenting his views to the King as a menace to military discipline.

Wolff had no difficulty in passing the near-by Prussian border within the required time; nor had he to worry about his future. In fact, he had only to travel to Marburg in Hesse and to accept there a professorship which had been offered to him earlier. Before long he became a martyr of science in addition to being a famous philosopher. His renown spread over Europe, and flattering invitations flowed in from Saxony, Sweden, and even Russia. He stayed, however, in Marburg under the most favorable conditions. Frederick William later realized his blunder and tried to regain Wolff; but the latter yielded only in 1740 when Frederick the Great, in one of his first actions as a monarch, extended to him a very generous invitation. Wolff returned to Halle, where he remained until his death.

Wolff's opus is vast. His main literary performance is the *Law of Nature Treated According to Scientific Method*,⁸⁵ in eight volumes, prepared when he was in his sixties (1740-1748). It was followed, as a kind of supplement, by a *Law of Nations Treated According to Scientific Method* (1749).⁸⁶ In the next year Wolff published an abridgment of the nine volumes under the title *Institutes of the Law of Nature and of Nations*.⁸⁷ We are mainly concerned with the work of 1749.

Wolff, who never had any contact with affairs of state or with the practice of law, approaches the law of nations in a purely philosophical vein, on the basis of the law of nature. He makes no effort to support his tenets by evidence from legal sources or legally significant events. Nor is he interested in juristic literature. His references are to

his own works; legal philosophers such as Cicero or Grotius are cited, though very rarely.

Like Hobbes, Wolff starts from a hypothetical state of nature; and he follows Hobbes also in applying this notion to individuals and to nations (states) alike. The state of nature is dominated by the law of nature, but Wolff's law of nature is diametrically opposite to Hobbes's. It is moralistic in the scholastic fashion, though at the same time it is permeated by the worldly and optimistic spirit of the teachings of Leibniz, Wolff's philosophical master. Wolff sees the goal of the law of nature in the self-preservation and self-perfection of each individual and each nation, and in the mutual assistance of individuals or nations, respectively, to the preservation and perfection of the others.

This scheme is elaborated by Wolff in terms of obligations and rights. Nations, like individuals, have first obligations toward themselves, aimed at self-preservation and self-perfection. Toward the others there are obligations aimed at assistance of *their* preservation and perfection. The obligations are the starting point in Wolff's system; but, as a derivation, a right corresponds to each obligation. The obligations of nations *toward themselves* have as their derivative natural (innate) ⁸⁸ rights to self-preservation and self-protection. The right springing from the obligation *to assist another nation* has a peculiar character. It is "imperfect," that is, the other nation is entitled merely to *ask* for the particular kind of assistance needed. The demand must be complied with only to the extent that the nation can do so without prejudice to the duties it has unto itself; and on this question it is the sole and the sovereign judge. Hence, the right of the nation asking for assistance is "imperfect" indeed. Yet it can be made "perfect" by treaty. For instance, each nation has toward every other an imperfect right to commercial relations; through a commercial treaty this right becomes "perfect." Such a "perfect" right is an acquired one, as contrasted with the natural (innate) rights which are likewise "perfect."

There is no need to expiate on the gratuitous and nugatory character of Wolff's "imperfect" rights. They served him to represent the relations among nations conveniently in legal terms—to fill the world arbitrarily with international "rights." There was more merit in Wolff's doctrine of natural rights of nations. They were the origin of what were called later "fundamental rights of states."

Still, it was impossible not to see that the picture of an international order derived from principles of a eudaemonistic morality needed modification in order to give it at least some resemblance to the order prevailing in this world of ours. This modification was provided for by Wolff in a puzzling manner. He considers the nations as organized in an association which he calls the *civitas maxima*, as distinguished from the particular *civitates* or states, which are associations of individuals. The *civitas maxima* is supposed to rest on a pact "or quasi-pact" of the several nations (in our day, perhaps, Wolff would call it "subconscious"). Its purpose is the promotion of the common good of the states through their cooperation under rules emanating from the *civitas maxima*. These rules are derived from its purpose. Wolff resorts to the fiction of a ruler of the *civitas maxima* who, "following the leadership of nature," defines her rules "by the right use of reasoning." The body of these rules is called by Wolff *jus voluntarium* as distinguished from the *jus necessarium* of the unadulterated state of nature; again, the adequate translation of *voluntarium* would seem to be "volitional" rather than the customary "voluntary."

The difference between Wolff's "necessary" and volitional law may be illustrated by his treatment of the just-war doctrine. Under the necessary law war can be just on only one side, but under the "volitional" law the war is to be considered as just on both sides as far as the effects are concerned; and to this extent the volitional law overrides the necessary law. (Evidently this distinction was suggested to him by Grotius' theory.)

Wolff's hypothesis of the *civitas maxima* has been misunderstood by various writers of the twentieth century⁸⁹ who look at it as a forerunner of the League of Nations, as an early and lofty plan for the reconstruction of the political world. Such an appraisal would have some justification in the case of the projects of Saint-Pierre or his predecessors, but Wolff's conception was of an entirely different character. This apostle of absolutism, who, for all his enlightened philosophy, defended torture and barbaric methods of capital punishment, was satisfied with the political structure of the world. He was not interested in the plans of Saint-Pierre, which cannot have been unknown to him. To Wolff, the *civitas maxima* was already extant; it was no more than the personification of a certain body of rules which he believed observable in international relations. He would go Hobbes one better:

not only individuals but nations, too, were held to be organized in statehood. And the prescriptions of the *civitas maxima* were not the morally desirable rules. As in Suárez's system the *jus gentium* was something secondary to the *jus naturale*, so in Wolff's conception the volitional was secondary to the necessary law. The mark of inferiority which was implied in the Suarezian *jus gentium* is brought into relief by Wolff with respect to his volitional law. For it is this law, emanation of the *civitas maxima*, that deprives the righteous but unsuccessful belligerent of his right. From the righteous belligerent's standpoint, Wolff admits, the volitional law is wrongly called "law."⁹⁰ Characteristically, in the eighteenth century which was so deeply interested in speculation on the nature and progress of man and society, Wolff's *civitas maxima* was almost everywhere repudiated, and especially by his faithful disciple, Vattel, than whom there was no more cosmopolitan-minded writer in the history of international law.

The "volitional" law of the *civitas maxima* must not be confounded with the customary international law and the treaties. In Wolff's system the latter two form a third and a fourth species of the law of nations ("customary" and "stipulative" law) in addition to the "necessary" and "volitional." The "volitional" law of nations is, in a sense, another law of nature; to wit, a law derived from the nature of a hypothetical organization of nations. Regarding its contents we are left pretty much in the dark.⁹¹ Confusion is increased by the fact that in the accepted Grotian terminology the term *jus voluntarium* is reserved for customary and treaty law.

The "customary" and "stipulative" parts of the law of nations are practically ignored by Wolff. The facts of international law have little significance in a system constructed from purely philosophical material. Take, for instance, his treatment of the law of ambassadors. Under the law of nations, necessary or volitional, Wolff assumes ambassadors do not enjoy extraterritoriality or an exemption from the jurisdiction of the receiving state. In addition to the general rights of foreigners they are entitled only to particular respect and a higher degree of security. Wolff is aware that this picture in no way reflects the state of the law; but, because the latter is only the effect of customs and treaties, the incongruity between the actual law and his own scheme does not disturb or interest him.

Concerning just war Wolff points out as a matter of "necessary" law that, peace being a "compromise," the original just cause of the

righteous belligerent is extinguished; thence war cannot be lawfully renewed regarding that cause. Peace also, he believes, creates an amnesty from the penalties incurred in war by violations of the "necessary" law of nations. That generalization of the rules laid down by the Peace of Westphalia well-nigh amounted to an invalidation of the just-war doctrine even from the viewpoint of the law of nature.

Wolff himself considered as his outstanding merit the "scientific method" to which he refers in the title of his work. This method is the so-called mathematical, which consists of the development of successive propositions by way of syllogism, in the ostensible manner of mathematical deduction, a pattern used in the seventeenth and eighteenth centuries by a number of thinkers who hoped thereby to attain perfect certainty. In Wolff's case it only led him to frequent pretentious trivialities and tautologies of the following type:

§ 282. No nation has the right to expel another from the territory which the other inhabits in order that it may settle in the same place. For a nation which inhabits a territory has not only ownership but also sovereignty over the lands and the things which are in it. If then it is driven from the territory which it inhabits, it is deprived of its right. Therefore, since no nation ought to deprive another nation of its right, no nation has the right to expel another nation from the territory which it inhabits, in order that the former may settle in the same place.

§ 285. Nations ought to be in concord with each other. For they are members of the supreme state into which they are supposed to have united, consequently they are to be regarded as citizens. Therefore, since citizens ought to be in concord with each other, nations also ought to be in concord with each other.

An eminent historian of philosophy, Windelband, calls Wolff an excellent "schoolmaster," but qualifies the statement by saying that his "systematic completeness and careful circumspection degenerates into pedantic diffuseness and ridiculous micrology." Wolff's self-complacency was a powerful factor in this process of degeneration. Spoiled by the successes of his earlier period, he indulged in a rigidly dogmatic attitude; naïvely, he called himself *professor universi generis*.

Wolff's foibles became conspicuous in his second Halle period. The students abandoned their once celebrated teacher, and Frederick the Great, though remaining gracious, assumed a reserved attitude and on one occasion showed open displeasure with his prolixity.

Wolff's European fame as a philosopher faded and almost disappeared in the nineteenth century.

In a way his *Law of Nations* is imposing as a comprehensive and minutely elaborated system of a philosophical law of nations and, especially, as the keystone of his formidable structure of the law of nature. No wonder that some contemporary followers of the law-of-nature philosophy were greatly impressed. In historical perspective the treatise does not appear very important. This late product of Wolff's pen offers little "enlightenment" or ingenuity; essentially it is a stale residue of scholasticism.

Wolff's posthumous fame exceeds his merits as the result of two rather accidental circumstances. One was the enormous literary success of his professed disciple, Vattel, a success not owed, as will be seen, to the Wolffian ingredients of Vattel's work, but nevertheless keeping Wolff's memory alive. The other was the misapprehension, arising in the twentieth century, that Wolff was an early herald of the League of Nations.

THE NATURALISTS (CONTINUED)

Emmerich de Vattel (1714-1767)⁹² was the son of a Protestant minister in the Swiss principality of Neuchâtel, which was connected by personal union with the Kingdom of Prussia. Having studied humanities and philosophy at the University of Basle, he found employment in 1746 in the diplomatic service of the Elector of Saxony, who then wore the crown of King of Poland. In 1749 Vattel was sent to Berne as Minister Plenipotentiary for Switzerland, but in 1758 he was recalled to Dresden as a privy councilor in charge of foreign affairs. Owing to illness he returned in 1766 to Neuchâtel, where he died the following year. Apart from some publications in lighter vein, such as *Amusements de littérature, de morale et de politique* (1765), he wrote some philosophical essays. In 1758 his main work appeared: *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*.⁹³ As the title indicates, this is a system of international law based on the principles of the law of nature and written with a view to practical application.

Vattel proposes to present Wolff's ideas on the law of nations to a public of "sovereigns and their ministers," in an easily understandable fashion. In reality the book is far more than a paraphrase of

Wolff's treatise. It is the work of a modern-minded diplomat who, while leaning on Wolff, systematically sets forth his own opinions on the most diverse topics of international and constitutional law. Frequently he develops Wolff's broad propositions into specific issues of actual international interest, viewed with the eyes of a practitioner of statecraft. For instance, where Wolff in general terms recognizes acquisition, by way of occupation, of dominion over a territory, Vattel makes it clear that actual possession is a prerequisite of legally effective occupation. He concludes that papal allotments of newly discovered territories to various rulers lack legal force; he examines the question whether the presence of wandering native tribes is a bar to occupation, and other matters not investigated by Wolff. In the analysis of treaties, a topic dealt with by Wolff in an abstract manner without real knowledge of the subject, he stresses the problems of interpretation, for example, those arising from the language of very old treaties, or from the use of technical terms; and he brings into relief the interpretative significance of the purpose as well as of the interdependence, of treaty provisions. He admits the *clausula rebus sic stantibus* where conditions have vitally changed.

In respect to neutrality, Vattel, as a Swiss, had the advantage of a keen awareness of the problems involved. He justly takes neutrality as the *ipso facto* effect of a war in respect to the nonparticipants in the war, whereas Wolff's treatment centers on the then more or less obsolete treaties of neutrality. Among the numerous special problems of neutrality expounded by Vattel but not considered by Wolff are: loans by a neutral to a belligerent; prize law; the right of visit and search; naval attacks within neutral waters; levying of troops and sale of booty in neutral territory. A matter of such importance as arbitration is barely mentioned by Wolff; Vattel, referring to Swiss practice, discusses it at some length, warning against it where "essential rights" of sovereigns are in dispute; but he recommends arbitration where "less important rights" are involved. This opinion suggests the distinction which became signal in the twentieth century between "justiciable" and "nonjusticiable" controversies. Throughout, topics as well as solutions show that Vattel had ideas of his own.

In spirit, too, Vattel's work differs from Wolff's. Vattel's attitude is more humanitarian, more cosmopolitan, and, in a measure, even democratic. Though he makes considerable concessions to absolute monarchy, with which he was linked by birth and employment, he

reacts first of all as a citizen of Switzerland, of the "country of which liberty is the soul, the treasure, and the fundamental law; and by my birth I am the friend of all nations." Emphatically he rejects the idea, admitted to a certain degree by Wolff, of "patrimonial" kingdoms, that is, of kingdoms based on the idea of monarchical ownership. He even advances views colored by the notion of popular sovereignty, and in some respects treads the same path as his great fellow countryman, J. J. Rousseau, who published his epochal works after the appearance of Vattel's book. He may well be counted among the writers who contributed to the formation of the ideas of the French Revolution; in fact, Abbé Grégoire's theses were almost entirely drawn from Vattel's treatise. There is also in his language a tinge of excitement and flourish which foreshadows later revolutionary phraseology.

Nor is the philosophical background of the work simply copied from Wolff's work. Vattel's common sense prevents him, as was mentioned earlier, from accepting the *civitas maxima*, the core and most original feature of Wolff's system. Still, Vattel preserves Wolff's fourfold division of the law of nations. The "voluntary" law, having lost its basis, the *civitas maxima*, is now described by Vattel somewhat obscurely as the "presumed" law of nations. Similarly, he extensively employs the concepts of "perfect" and "imperfect" rights. He also avails himself of Wolff's deductive method and nonchalantly uses the *ipse dixit* as sufficient proof for asserting rights, especially "imperfect" rights, under the law of nations—a method less excusable with him than with his master who, after all, kept his conclusions within the realm of philosophical generalities. In Vattel, Wolff's propensity for empty syllogistics degenerates into shallow oratory. Take, for instance, the chapter which he devotes to a sovereign who wages an unjust war. Vattel emphatically assures the reader that such a sovereign has to repay the evil done and must "even submit to punishment, if that be necessary as an example, or as an assurance to the injured party or to human society." Vattel does not say who would have to inflict the punishment upon the culprit. On the contrary, in the later chapters he espouses Wolff's doctrines on the justness of war on *both sides*, and on the amnesty effected by peace treaties. Desirous, however, of putting some force behind his statement on the punishment of the guilty ruler, he expatiates on the latter's wickedness as follows:

He is responsible for all the evils and all the horrors of the war. The bloodshed, the desolation of families, the pillaging, the acts of violence, the devastations and conflagrations are all his work and his crime. He is guilty towards the enemy, whom he attacks, oppresses, and massacres without cause; he is guilty towards his people, whom he draws into acts of injustice, whom he exposes to harm without necessity or reason—towards those of his subjects who are oppressed or afflicted by the war, who lose their lives, their property, or their health because of it; finally, he is guilty towards the human race, whose tranquillity he disturbs and to whom he sets so pernicious an example. What a dreadful list of miseries and crimes! What an account to render to the King of Kings, to the common Father of mankind! May this brief sketch be heeded by the rulers of Nations, by princes and their ministers. Why shouldn't we look for some fruit from it? Can those in high position be supposed to have lost all sense of honor, of humanity, of duty, and of religion?

His declamations go on and on in this fashion. Finally, he is alarmed by the hypothesis that an unrighteous ruler may be able to unload his obligation upon his subjects. Thus he queries anew:

Would this wash away his crime and give him a clear conscience? Though vindicated in the eyes of the enemy, would he be so in the eyes of his people? It is a strange kind of justice to make reparation for his own wrongs at the expense of other men; this is no more than changing the objects of his injustice. Weigh all these things, ye rulers of nations! and when you have clearly seen that an unjust war draws you into a multitude of iniquities which to repair is beyond your power, perhaps you will be less inclined to undertake it.

The weakness of Vattel's reasoning was aggravated by his lack of legal training. His diplomatic experience, not very extensive when he wrote the book, nevertheless furnished one of its more valuable features, but was inadequate for the ambitious task undertaken. This task required a familiarity with juristic methods and literature which he did not possess. It is probable that the defects of Vattel's training are primarily responsible for the striking ambiguity of his formulas and for the inconsistency of many of his conclusions. For example, he firmly states that in case of war a neutral state must grant "innocent" passage to a belligerent. But this statement is at once made illusory by the further assertions that the belligerent must ask the neutral power for permission, that the latter shall be the sole judge of whether

or not the passage asked for is innocent, and that a "weak" nation may refuse a passage that would expose it to great danger. And when he adds that with respect to the grant or refusal of passage both belligerents should be treated in the same manner, this again is made nugatory by the qualification that "difference of circumstances" may give a good reason for acting otherwise. In another section he assumes that, where it has been the custom of a nation to permit levies of troops for foreign sovereigns (the old Swiss practice), permission may also be granted in case of war, unless it would be "for an improper and evidently unjust cause"; also, levies may be granted to one belligerent and refused to another because the nation "may have reasons" for refusal which hold good only as against the latter. This unprincipled and hazy proposition is again abandoned, and violation of neutrality is admitted to exist where the levies granted to one belligerent are "considerable."

Another instance may be taken from Vattel's inquiry into a question of present significance, the seizure of debts owed to an enemy national. Vattel declares such seizure a lawful means of reprisal, with the exception of deposits entrusted to the public faith. In the discussion of warfare he reiterates this tenet—without the exception, incidentally—but he asserts that the interests of commerce have induced all the sovereigns of Europe to be "less vigorous" on this point. This vague statement is followed by the allegation that "as soon as this custom has been generally received," a sovereign would, by the confiscation, violate the public faith. Vattel leaves the reader in the dark as to what the relaxation amounted to; in which countries the alleged custom actually existed and whether the "violation of public faith" would be tantamount to violation of the law of nations. In a case involving the confiscation of enemy property, decided in 1814 by the Supreme Court of the United States,⁹⁴ Vattel's position was relied on in the majority opinion written by Chief Justice Marshall, as well as in the minority opinion written by Mr. Justice Story. Interestingly enough the latter—well known as an eminent legal scholar—questioned the existence of the custom alleged by Vattel, as well as Vattel's qualification as a jurist.

Among the legal learned Vattel has never met with much praise. Jeremy Bentham's remarks about him have been quoted frequently. Pointing to Vattel's penchant for tautologies, Bentham observes that

his characteristic statements are of this type: "It is not just to do what is unjust."

It is one of the many paradoxical facts in the history of the law of nations that Vattel's book attained a circulation second only to that of Grotius' work. Especially in the first half of the nineteenth century it was—in the words of Robert von Mohl, outstanding historian of political science—"a kind of oracle with diplomats, and especially with consuls."⁹⁵ The explanation is that the rapid increase in international legal problems after the Napoleonic period made the use of a systematic and detailed reference book on international law indispensable to all persons active in foreign affairs, and that Vattel's treatise, which embodied much diplomatic experience, was well suited to the purpose. Grotius' work was outdated, and Bynkershoek's studies were scattered and not comprehensive enough. The ambiguity of Vattel's propositions—indeed, the ambiguity of an oracle—made it only the easier to refer to his treatise in diplomatic correspondence. Moreover, his presentation was facile and the philosophical paraphernalia could be ignored without diminishing the usefulness of the book.

In the English-speaking countries, and especially in the United States, Vattel acquired an even higher authority.⁹⁶ In accord with the general notion of the French Enlightenment, Vattel professed great admiration for the English Constitution; and the general political conception underlying Vattel's discussion quite naturally met with the favorable predisposition of a public whose most influential political philosopher was John Locke. In judicial proceedings involving international law, English lawyers, as we have seen, were perfectly ready to draw on Continental writings and of course took a keen interest in such a modern and comprehensive treatise as Vattel's. As early as 1760 the first English translation made its appearance.

In America the book fitted in with a unique historical situation. In 1775 a Swiss publisher in Amsterdam, Charles W. F. Dumas, an admirer of Benjamin Franklin, sent him three copies of a new French edition of Vattel's work, which was previously unknown in America. In his letter of thanks Franklin observed that the book "came to us in good season where the circumstances of a rising state make it necessary frequently to consult the law of nations." Since the Colonies had been excluded from the administration of foreign affairs, the need

for information such as Vattel offered was dire indeed. Moreover, the spirit of the work was well in accord with the principles of the Declaration of Independence. It soon became a textbook in American colleges and, after the establishment of the Republic, the favorite authority in American theory of International law. The following statistics, prepared by Professor Edwin D. Dickinson⁹⁷ on the basis of American cases decided from 1789 to 1820, speak for themselves:

<i>Citations in Pleadings</i>	<i>Court Citations</i>	<i>Court Quotations</i>
Grotius 16	11	2
Pufendorf 9	4	8
Bynkershoek 25	16	2
Vattel 92	38	22

It should be mentioned, however, that such citations or quotations are sometimes influenced by extrinsic motives and do not always indicate real influence on the part of the cited author. There is, for instance, a well known case of more recent date, *United States vs. Arjona* (1887),⁹⁸ in which Vattel is copiously quoted. Arjona had counterfeited Colombia banknotes in the United States. The question before the court was the constitutionality of a congressional enactment which had made the counterfeiting in the United States of notes and other securities of foreign governments a punishable crime. The court answered the question in the affirmative because the legislative power of Congress extended to all intercourse with foreign nations, and especially to the regulation of commerce with foreign nations. In this connection the court drew heavily on Vattel. The latter, after having explained that counterfeiting prejudices the sovereign's prerogative of coinage, goes on to assert that it is "easy to conclude that if one nation counterfeits the money of another or allows and protects false coiners engaged in such activity, it does the other nation an injury." Because it relates to coins only, the court does not dwell on this assertion but stresses the next sentences in which Vattel, referring to the international use of bills of exchange, declares it to be an (imperfect) obligation of sovereigns to protect that custom "by good laws in which every merchant, citizen, or foreigner may find security"; Vattel, even in general terms, deems it to

be the (imperfect) "duty" of every nation "to establish wise and just commercial laws." On the ground of these allegations, the court assumes an obligation of the United States to punish the falsifier of foreign bonds, notes, and other commercial securities: an obligation to be fulfilled under the Constitution only by the federal government. However, Vattel's remarks do not warrant the court's international theory, especially if his utterance on counterfeiting is taken—as it is by the court—to bear upon coins only. Generally, the alleged international obligations are nothing but personal notions of Vattel, proffered as doctrines of the law of nature. They had not even been set forth by Wolff, much less by other writers, to say nothing of the complete lack of evidence in state practice. This and other objections do not matter much in the *Arjona* case, because protection of foreign banknotes, which are undoubtedly instrumentalities of international commerce, in any event comes under the power of Congress to "regulate commerce with foreign nations." Confronted with a constitutional problem indirectly involving a limitation upon state rights, the court apparently deemed it desirable to adorn its opinion with colorable documentation from an international authority, the gratuitous assumption by the court of an international obligation of the United States being innocuous under the circumstances.

Outside the United States and England one finds very little evidence that Vattel's status was one of authority in the courts or in the legal profession; in the former countries, too, such evidence vanished in the twentieth century.

Some bibliographical data are informative. There have appeared twenty-one editions of the original French text; twenty-three translations into English, thirteen of them American; six Spanish, one German, and one Italian translation. Nearly all these editions or translations were published in the eighteenth or in the first half of the nineteenth century; a few are scattered over the third quarter of the nineteenth century. The volumes on Vattel of the *Classics of International Law* were published in 1916, as a matter of scientific and pedagogical interest. The German translation is dated 1760; the Italian, 1805. In Germany, Vattel has long been almost unknown, even among learned jurists, and the great number of French editions is probably attributable more to the familiarity of diplomats with the French language than to any especially high reputation Vattel may have enjoyed in France.

Pufendorf, Wolff, and Vattel are by far the foremost representatives of the "naturalist" school of international law of the period. Among its minor representatives we may mention Jean Jacques Burlamaqui, a Calvinist of Geneva, who published in 1751 a systematic discussion of international law in terms of a pure natural-law philosophy,⁹⁹ and his younger friend Jean Barbeyrac, a French Calvinist who as a child had been taken to Geneva. While a scholar in his own right, Barbeyrac is better known for his translations of Grotius, Pufendorf and other noted authors.¹⁰⁰ In England, Thomas Rutherford published, between 1754 and 1756, lectures on Grotius under the title "Institutes of Natural Law." A small part of the work was devoted to international law, which Rutherford treated in the most abstract "naturalist" manner. He criticized Grotius in matters of detail; but otherwise there is little originality in his work, which gained some reputation in England. English literature on the law of nations was not much concerned with natural law. We may state, however, that John Locke clung to the notion of just war by asserting that only in the case of such a war did the victor acquire a right over the vanquished.¹⁰¹ The tenet belongs to those phases of Locke's thought by which he integrated into his system parts of Thomist philosophy; in this particular case, his anti-conquest proposition was to emphasize the necessity of moral foundation for governments. He was not concerned with international law as such. Locke made a fresh and almost desperate attempt to explain rationally the doctrine of just war on legal or political grounds, but finally and characteristically he escaped into a religious-transcendental speculation which fits badly into his system of thought.

In conclusion it must be mentioned that, as in the preceding period, a book title referring to the "law of nature" or even to the "law of nature and of nations" does not necessarily indicate any great concern with the special problems of international law.¹⁰²

THE EARLY POSITIVISTS

England is the cradle of positivism. Gentili had undergone the influence of English realism, but he can hardly be called a positivist: he was too deeply rooted in ancient Roman law and, in his main work, too little concerned with actual state practice (perhaps there was not sufficient material available to him). However, the characterization

as a positivist can unhesitatingly be applied to Gentili's successor in the chair of Regius Professor of Civil Law at Oxford, Richard Zouche (1590–1660).¹⁰³ A descendant of old nobility, Zouche served for a time in an important position as a judge, in addition to his academic duties. Like Gentili in the Mendoza case, Zouche was officially consulted by the English government in a sensational affair: the murder committed by Don Pantaleon Sa, brother of the Portuguese ambassador. In accord with Zouche's opinion the murderer was denied immunity and put to death. The parallel with Gentili can be carried further inasmuch as Zouche, too, worked out his views in a monograph, *Jurisdiction over a Delinquent Ambassador* (1657).¹⁰⁴ Earlier, in 1650, he had published his main work on international law under the title *Juris et judicii fecialis, sive juris inter gentes et quaestionum de eodem explicatio*.¹⁰⁵ It forms part of a methodically arranged series of moderate-sized textbooks mainly for the use of students, all prepared by Zouche. A treatise on the *Elements of Jurisprudence*,¹⁰⁶ based on Roman law, served as an introduction, to be followed by separate tracts on feudal, ecclesiastical, military, maritime, and, finally, international law. The inclination of legal writers of the period to try their hand at extraneous matters was less conspicuous in Zouche, though he was the author of a kind of juvenile geographical poem, and was suspected of having written in later years a so-called comedy in which personifications of "Fallacy," "Opposition," and "Ambiguity" were the main figures.

The circumstantial title of Zouche's work on international law is occasioned by the fact that Zouche wanted to avoid the term *jus gentium*, which was still loaded with ambiguity. For a professor of civil law it was obvious to think, instead, of the *jus feciale* and to choose Explanation of the Jus Feciale and of the Questions Concerning It as the principal title of his work. This idea miscarried, because the average reader could not possibly understand the most learned reference to the ancient law, to say nothing of the fact that the *jus feciale* was a typically Roman institution. Evidently Zouche himself was not quite satisfied with his choice: he added as a second title *jus inter gentes*, leaning on the phraseology of the Spaniards—namely, the law prevailing among princes or commonwealths of the various nations (*inter principes vel populus diversarum gentium*). Neither term has won favor in later literature. *Jus gentium*, as we have seen, became the technical term for the same concept; writers were probably

reluctant to lose its millennial flavor. Nevertheless, Zouche's endeavor showed his discernment.

Zouche was the first author to undertake a systematic treatment of the entire field of international law. Though he merely touched upon some important topics, such as neutrality, and gave very little attention to treaties, his enterprise was highly meritorious. Moreover, he coordinated the laws of war and of peace, thus elevating peace from an incident of war to a status. The methodological improvement was all the more conspicuous because he placed the law of peace ahead of the law of war. England's relative freedom from foreign wars during Zouche's day may have influenced his approach. Another factor was perhaps the Peace of Westphalia, which had been concluded two years before the publication of the book, and which had filled the peoples of Europe with fresh confidence.

In other respects Zouche's system is less satisfactory. His dominant principle of organization, followed through his series of textbooks, is strange indeed; he treats noncontroversial parts of his subject matter under the caption of *jus* and thereafter, under the caption of *judicium*, the controversial ones. It is within these two parts, of which *judicium* is disproportionately longer, that the further division into the law of peace and of war is developed. Each of the subdivisions discusses the following matters: (1) status; (2) *dominium* (property); (3) *debitum* (debt); (4) *delictum* (tort), a sequence indicating the author's dependence on Roman private law.

Within this organizational framework, more than two hundred varied issues are briefly dealt with. Many do not belong to what is today considered as international law proper. For instance, Zouche treats problems of private international law (e.g., whether a foreigner may inherit real estate situated in the forum) and of municipal public law (e.g., whether one may leave one's country without permission); he is especially interested in the question of succession to the throne, which likewise forms part of municipal public law (more specifically of constitutional law). In the latter case the alleged connection with the *jus inter gentes* is limited to the observation that contests over succession to a throne sometimes lead to war. The discernment shown in the choice of the title has not been carried through in the details of the discussion.

The most striking peculiarity of Zouche's inquiry, however, consists in the fact that he simply sets forth the controversial issues as such,

without venturing to offer a decision—a method which rather sophistically he tries to excuse as “socratic.” Certainly one has to take into consideration the tradition of the English common law which attributes to legal writers a much more modest position than does the tradition of the civil law. In fact, there is a general inclination on the part of common-law jurists to shun discussion of unsettled issues, which is considered to be the prerogative of the courts. But even if this fact is fully taken into account Zouche’s reticence remains puzzling, especially since he touches only in a few instances upon matters belonging to the jurisdiction of the courts.

The only theoretical statements by Zouche are found in some introductory sentences of the book. There he describes the *jus inter gentes* as a law “which has been accepted by customs conforming to reason among most nations or which has been agreed upon by single nations,” to be observed in peace or war. Hence, with him international law is based distinctly on custom—supposing it is reasonable—and on treaties. While Zouche mentions natural law, he considers it to be knowable from the actual attitudes of men. Of the traditional natural-law doctrine his book shows practically no mark. Characteristically, he has only a few sentences on just war; in these he takes it for granted that a war may be just on both sides and—differing from Suárez—that “probable reasons” cannot offer sufficient justification for war. On the whole, Zouche is occupied with specific situations of international bearing including a few cases decided by courts. More than any of the earlier writers, he takes his examples from the more recent past. Though his approach is still that of a Romanist, there are only scattered references to the *Corpus juris*. His most respected authority is Grotius.

Despite the weakness of his theoretical analysis, Zouche takes a distinguished place in the history of international law. His importance has frequently been recognized by writers, perhaps more so on the Continent than in England.¹⁰⁷ In addition to the valuable features of his organization of material he developed new and important aspects of international law, treating them with common sense.

A far more impressive and historically prominent representative of the positivist school of thought is the Dutchman Cornelis van Bynkershoek (1673–1743).¹⁰⁸ In his works we find a happy combination of the strongest and noblest qualities of the juristic mind applied to

the scrutiny of problems of international law. From 1704 he was a member, and from 1724 the President (Chief Justice), of the Supreme Court of Holland, Zeeland, and West Friesland in The Hague. Widely respected and admired, he held this high office until his death.

As a young man, prior to his judgeship, he edited a satirical periodical for a short time; but otherwise all his literary efforts were devoted to the law. Except for a study in 1702 on the *Dominion of the Seas*,¹⁰⁹ his earliest juridical writings were concerned with private law. In his mature years he turned more and more to international law. In 1721, like Gentili and Zouche, he published an essay on *Jurisdiction over Ambassadors*¹¹⁰ that was inspired by an actual case. In 1737 his main work, *Questions of Public Law*,¹¹¹ appeared. As the title indicates, it is devoted to public law in general, offering a discussion of selected problems rather than an over-all study. The first of the two "books," of which the volume consists, bears exclusively on the law of war; the second book contains some important chapters relative to international law. All in all, Bynkershoek's publications on international law cover most of the problems that arose in the rather restricted international area of his day. For him *jus gentium* means international law.

Bynkershoek's work is entirely free from the incubus of theology. Though he had originally studied theology and remained interested in it, no religious argument is used, nor is reference to the Scriptures made in his writings on international law; remarkably, this is true even of the early essay on the *Dominion of the Sea*. The law of nature is practically ignored in his discussion. Nor is he much concerned with the just-war doctrine. While he finds the sources of the law of nations in reason, he does not envisage the dogmatized reason of scholastic tradition but the use of common sense in finding the best and most equitable solution. Support of reason should be sought, according to Bynkershoek, primarily in treaties and in widely established precedents. In this respect he definitely recognizes the changeability of the law of nations and consequently the inadequacy of ancient instances. Instead, he takes his documentation on the whole from modern times. Treaties and decrees of the Dutch States-General are the favorite type of evidence, although he also refers to good legal and historical works, Dutch and foreign. The only archaic element is the rather frequent citation of the *Corpus juris civilis*. Bynkers-

hoek was aware that, on principle, Roman law cannot control in matters international; but as a judge he was quite naturally influenced by the *Corpus juris* which was then the general law of the Netherlands, as of other civil-law countries. Despite his strong emphasis on "reason" as a source of the law of nations, his actual method is distinctly positivist. At the same time, because of predilection for documentation from Dutch material, it foreshadows the later nationalist school of international law.

In Bynkershoek's writings, modernness of material goes hand in hand with liveliness of presentation. Natural talent and long judicial experience enabled him to give his reasoning perfect juristic shape; it is lucid, terse, direct, and forceful. And, even more important and more valuable, the reader receives the keen impression that this judge-author is inspired by high sentiments of impartiality and justice. Bynkershoek claims and exercises the right to criticize the decisions of his sovereign, the States-General, and he does not hesitate to deny protection to the interests of his country where, in his opinion, they are not supported by the law.

On the other hand, Bynkershoek conspicuously exhibits the defects of his virtues. The intellectual and moral vigor of the Chief Justice grew into a marked self-assertiveness which, in a striking way, dominates his features as they appear in his portrait. Significantly, much more than other writers, he speaks in the first person singular. Sometimes he would overdo his juristic vigor. Regarding war, he rightly distinguishes the law that permits the destruction of the enemy by any means of violence and deceit whatsoever, from generosity, which of course is outside the scope of jural discussion. However, Bynkershoek puts this tenet in a crude way which gives the impression that he is not at all interested in generosity concerning warfare. Generally speaking, a certain bluntness pervades his work. The absence of political considerations amounts to lack of political insight when, in questions of Dutch constitutional law, Bynkershoek maintains to the utmost the sovereignty of the "provinces" (comparable to the American states) for which he claims the right of waging wars of their own, thus placing his authority behind a particularist doctrine which half a century later brought about the downfall of the Dutch Republic. Bynkershoek was not a Dutch Chief Justice Marshall.

In international law, Bynkershoek's outstanding accomplishment

relates to neutrality. He convincingly refutes Grotius' infusion of the just-war conception into the law of neutrality. Rightly he points out that it is not the neutral's duty to sit as judge over his friends who fight each other, and that the neutral ought not to show any preference for a belligerent by helping it with advice, men, or material. This view, which was elaborated by Huebner and other writers, came to be universally accepted.

The maritime aspects of neutrality, so crucial to the Dutch, received special consideration from Bynkershoek. Following the *Consolato del mare*, he objects to the rule, "free ships, free goods," which, as pointed out, had become the pivot of Dutch diplomacy, and he insists that Dutch treaties, while binding the signatory powers, have not been able to change the canons of general maritime law. Bynkershoek then goes on to detail the prize law and to determine carefully the time when ownership of a vessel or of goods passes to the captor. Referring to Roman law, he decides in favor of the time when the captor obtains possession of the booty. Such possession, he points out, is especially obtained where the booty is brought by the captor to a defensible place; the period of possession he considers irrelevant (Grotius assumed a custom requiring a period of at least twenty-four hours). On this basis, Bynkershoek treats the intricate problems which arise when the captured goods are recaptured from the first captor. Regarding blockades, he interprets the various decrees of the Dutch government in the light of the theory that a blockade must be effective. On the other hand, he takes a strong stand against neutral blockade runners. In his opinion, ship and cargo are a good prize after an attempt at breaking the blockade, and even at a far distance from the invested place, unless the ship reaches its (neutral) port of destination *without having been chased*. Possibly, therefore, the ship may be captured after coming out of port. These and similar questions are casuistically investigated by Bynkershoek, with great discernment and without regard to special Dutch interests; as a matter of fact, it is particularly on this score that he criticizes decrees of his government. No wonder that the pertinent chapters of his book—much more than later monographs by other writers¹¹²—were generally considered a treasure of information in prize cases.

Bynkershoek's views regarding the freedom of the seas are set forth in his early essay on the *Dominion of the Seas*. Bynkershoek does not adopt the Grotian thesis of the freedom of the seas as a matter of

theory, but reaches the same result by an inquiry into the facts. In his opinion the control of the sovereign of the coast extends only as far as cannon will carry. This tenet became an almost generally accepted principle of international law. Because of the progress of military technique it makes the extent of littoral sovereignty a fluctuating quantity, but during the late eighteenth and the nineteenth century the range of three miles (a league) became the generally accepted standard, following a suggestion made by Galiani on the basis of the military technique of his time.

Another remarkable section of Bynkershoek's work deals with treaties. In 1669 the Estates of Holland publicly condemned a book by a Dutch author who had advanced the view that a treaty must be kept only as long as it is advantageous to do so—a view obviously perilous to a commercial and relatively weak nation. Bynkershoek, joining in the disapproval of that writer, rejects the doctrine of a tacit *clausula rebus sic stanibus*; but he opens a new loophole by releasing the sovereign from a promise no longer within his power to keep, and makes this tenet still more problematical by the proposal that a third prince, "who is to be a man of principle"—so to speak, a prince from wonderland—should decide on the question of that power.

Elsewhere Bynkershoek's analysis of treaties shows his judicial straightforwardness. Under certain clauses of the Treaty of Münster, the Netherlands had the power, which they actually exercised, to exclude foreign Jesuits from Dutch territory. Bynkershoek, however, pointed out that the Estates of Holland had forfeited this right by insisting upon and obtaining from Spain the recognition of the right of Dutch Jews to sojourn in Spain for the purpose of trade. As a Calvinist, Bynkershoek was certainly not prejudiced in favor of the Jesuits, and he gave the Jews full credit for their contribution to Dutch commerce; but he would not allow political considerations to influence his judgment in the interpretation of a treaty.

In the discussion of alliances, one of Bynkershoek's important tenets is questionable or obscure. While he eliminated the just-war doctrine from the law of war and of neutrality, he would apparently allow an ally who had promised armed help against aggressors the bad excuse that the actual aggression was "just";¹¹³ but elsewhere he seems merely to envisage the arguable defense that the attacked sovereign had himself unjustifiably provoked the aggression.¹¹⁴

The success of Bynkershoek's writings has been great and lasting; even today they impress the reader as surprisingly lively and modern. Time and again his tenets have received careful attention in the literature of international law and have been amply referred to in pleadings and judgments. Particularly in American and English courts, Bynkershoek won high respect. In a judgment of 1796 the Supreme Court of the United States called him "a very great authority."¹¹⁵ It was probably the plain and realistic character of Bynkershoek's reasoning that attracted the common-law jurists. This attraction operated in a somewhat unusual way when, in 1759, a certain Richard Lee published a literary translation of the first book of the *Questions of Public Law* as his own, under the title, *A Treatise on Captures and War*, omitting Bynkershoek's important "Introduction to the Reader," which would have revealed the real author. A second edition, disclosing Bynkershoek's authorship, was published in 1803 because, as we learn from the Preface, the copies of the first edition were "being sold at an extravagant price." Thus, Mr. Lee, after all, has the merit of having procured, against his will, evidence of the excellence of Bynkershoek's achievements. In 1810 another English translation of the first book of the *Questions of Public Law* was published. Barbeyrac translated the monograph on the *Jurisdiction over Ambassadors* into French in 1723, only two years after the appearance of the original.

Prior to Bynkershoek, the more theoretical aspects of positivism had been investigated by the German, Samuel Rachel (1628–1691).¹¹⁶ Rachel, like Pufendorf, was the son of a Lutheran minister. After a disastrous and poverty-stricken youth Rachel improved his situation and later became professor of the Law of Nature and of Nations at the University of Kiel; in the last period of his life he was a diplomat in the service of the Duke of Schleswig-Holstein-Gottorp. He published a number of legal and philosophical studies. As in Zouche's case, a work on international law saved his name from oblivion: the *Dissertations on the Law of Nature and of Nations* (1676).¹¹⁷ This not very voluminous tract purports to be a refutation of Pufendorf's "naturalist" tenets. Following Zouche, Rachel asserts that the law of nations (*jus gentium*), which to him is a law among states, consists of customs and treaties. He rightly counters Pufendorf's view of the purely factual character of treaties by pointing to the Peace of West-

phalia which had become the cornerstone of international law in a great part of the European Continent. Not inappropriately he calls Pufendorf, because of the latter's belittlement of international conventions, "the slave of his hypothesis"; namely, of the engulfment of everything in the law of nature. Customs are conceived by Rachel, who on this score follows Pufendorf, as "tacit" conventions; but he does so apparently in order to prove their binding force, which he considers as axiomatic in the case of conventions.

In a more philosophic vein he expatiates upon the necessity and the actual existence of the law of nations, making the interesting point that diplomatic complaints of injury done are actually advanced in terms of the law of nations, rather than in terms of the law of nature. A less fortunate proof of Rachel for the existence of the law of nations was his reference to the international circulation of certain coins. It is true that, from antiquity, many coins had circulated freely outside the country of origin; but this was merely a usage emerging from the scarcity of coins and from the superior qualities of certain foreign coins. Though, under statutes or commercial usage, foreign coins had frequently to be accepted by creditors in payment of debts, this legal situation had nothing to do with international law.

Rachel includes in the law of nations what is today called international courtesy, such as customary ceremonials in the reception of ambassadors or formal expressions of sympathy at the death of a foreign sovereign; but at least he is the first to explain that these canons "have not the same authority and inevitableness" as other precepts of the law of nations.

Aside from the law of nations Rachel recognizes a law of nature. To this son of a Protestant minister the law of nature is even more intensely and more directly than to the scholastics a matter of God's will. Rachel accentuates the basic disparity between the law of nature and the law of nations by treating them in separate dissertations. For instance, he assigns to his law of nature the question not only of just causes of war but also, at least in part, of the methods to be used in warfare; however, he considers that the issues of authority to wage a war (*auctoritas principis*) and of formal declarations of war, belong to the law of nations. At the bottom of this differentiation one perceives a sound, or at least intelligible, idea; in the absence of specific customs and treaties the questions of just cause and of

moderation in warfare are addressed to conscience only. To this extent Rachel suggests the elimination of the just-war doctrine from international law. However, he is inconsistent. Dominated by his idea of the religious sanctity of natural law, he espouses the medieval doctrine according to which enactments or judgments violative of the law of nature are void, an attitude puzzling in a stanch Lutheran, if one considers that superiority of the state *in foro externo* is fully recognized by Lutheranism. At any rate, Rachel's tenets imply a legal, and even a superior legal, character of his law of nature. It is true that he did not explicitly carry over the notion of the superiority of natural law to his law of nations. On the contrary, he admitted, following Grotius, that public and declared wars confer upon each party the right to inflict any injury whatsoever upon the other party. In this crucial respect, then, the justness or unjustness of the cause is irrelevant, so that natural law would not take precedence over the law of nations. Hence, Rachel's theory remains obscure.

Rachel's influence upon later developments has been insignificant. Only here and there has he been cited, chiefly by German authors. His merit in refuting Pufendorf's naturalist radicalism is limited; that doctrine was stillborn. But Rachel does have the merit of having presented a more comprehensive theory of the positivist approach to international law than any writer before him, and of having advanced in this connection some interesting notions. Hence, there was some justification for including his dissertations in the *Classics of International Law*.

However, it seems impossible, by any stretch of the imagination, to consider as a "classic" Johann Wolfgang Textor's *Synopsis of the Law of Nations* (1680),¹¹⁸ to which the same honor was extended. The title is promising, but in reality the author, who was then a professor at Heidelberg, offers a medley of private, German constitutional, and international law.¹¹⁹ The latter phases exhibit neither new theories nor anything else worth mention. Textor has sometimes been described, together with Rachel, as a "positivist"; but even this is open to doubt. Also the exclusive international significance of the term *jus gentium*, ascendant since Hobbes's day, is lost with Textor. Nor has his book won authority within or without Germany. Textor had, however, the distinction of being the great-great-grandfather of Johann Wolfgang Goethe.

THE LATER POSITIVISTS

Positivism became more pronounced in the last quarter of the eighteenth century. Its center shifted then to Germany, where Johann Jakob Moser and Georg Friedrich von Martens were its main representatives.

Johann Jakob Moser (1701–1785),¹²⁰ was born in Stuttgart in a family many of whose members had served the government or the Protestant Church of Württemberg. His life was full and varied. For almost twenty years he was Councilor of the Württemberg Estates, and at other times he held official positions with various German potentates. At times he was a professor in German universities. Through long periods he made his living as a free-lance writer of legal opinions. He also founded a school of statecraft and diplomacy, probably the first of its kind; it was discontinued after a few years, owing to his appointment by the Württemberg Estates. Despite his manifold activities, which we are told he performed with the greatest devotion, he was one of the most prolific writers in German history—it is said he published more than five hundred volumes, all in German. His first study appeared when he was eighteen years old (a year later he became a professor at the University of Tübingen), and he pursued his literary work into the ninth decade of his life. To a certain extent, the mass of his publications may be explained by the fact that apparently by far the greatest part consisted of reproductions of documents, while many others were brief pamphlets.

Like so many important figures in the early history of the law of nations, Moser was possessed of a deep religiosity. He was a faithful member of an evangelical-mystic Lutheran sect, the Pietists. His natural simplicity and probity drew strength from his imperturbable trust in God. While moderate if not humble in his views and modest in his bearing, he exhibited on various occasions an admirable firmness in matters of principle or human dignity. As the Councilor of the Württemberg Estates, who were then engaged in a bitter fight against the arbitrary rule of their despot Duke, he so steadfastly vindicated their rights that the aroused Duke ordered him to be imprisoned in the Fortress Hohentwiel, where he was held for more than five years. Though in his sixties, Moser was subjected to dire deprivation and

refined cruelty. Being denied the use of ink and pen, he had to employ the points of snuffers for scratching words into some books and the paper of letters received. During all this time he preserved an astounding and unwavering endurance and fortitude, composing numerous pious poems, working on his autobiography, and even writing a humorous narrative. But the Duke was adamant. It was only through the strong efforts of Frederick the Great that Moser finally regained his freedom. After his liberation, which was heartily cheered by his countrymen, he did not indulge in hatred or bitterness, but set his mind upon helping the Estates to settle their disputes with the Duke. At the age of seventy Moser withdrew from public affairs.

Moser's writings were preponderantly devoted to the public law of the Empire and its numerous principalities. At the age of thirty, he conceived the idea of working on international law (*Völkerrecht*). Apart from some preliminary studies,¹²¹ however, he succeeded only in his late seventies in completing his main work on that subject, the quaint German title of which may be translated approximately as *Essay on the Most Recent European Law of Nations Regarding Peace and War, Based Principally on Those Public Acts of the European Powers and on Other Events Which Have Happened Since the Death of Emperor Charles VI in 1740*.¹²² It consisted of twelve octavo volumes which appeared from 1777 to 1780. Two supplementary series of *Contributions to the Most Recent European Law of Nations in Times of Peace, and in Times of War*,¹²³ altogether eight volumes, appeared from 1778 to 1781. The German public law regarding international relations was treated in his *German External Public Law* (*Deutsches auswärtiges Staatsrecht*, 1772).

In the Introduction to the Essay, Moser declares programmatically that he is exclusively concerned with the actual (*wirkliche*) European law of nations; that is, he says, with the ways in which European rulers and states customarily "behave" in their negotiations. What he offers is no "political fiction" (*Staatsroman*) but, as it were, an "ordered political itinerary through the whole of Europe, by a traveler contented with observing and annotating things with no intent of glossing." Moser does not precisely deny the existence of a law of nature, but he considers it as unavailing because among the greatest scholars even the fundamentals are controversial, because it can be twisted too easily, and because it is silent with regard to many special situations. He admits that diplomats in official documents sometimes

invoke a law of nature, but then, he says, the opposing party would "repay by the same coin" so that eventually there would remain what was before—babble.

On the other hand, Moser does not doubt that there is a law of nations as such. As evidence he lists a great many utterances taken from diplomatic documents and citing the law of nations. This law consists, according to him, of treaties and of custom. The science of the law of nations can be demonstrated only from these sources, hence from experience.

However, the reader, turning, after this promising Introduction, to the text of the *Essay*, is likely to be disappointed. Applying a haphazard organization worked out in inquiries into another subject, the public law of Germany, Moser divides his work into twenty widely interlapping "books." The treatment is utterly uneven; while some "books" cover only a few pages, the one on embassies extends through two volumes of about twelve hundred pages altogether. For the most part, the twelve volumes consist of texts of treaties, declarations, diplomatic letters, official and private reports, not only on legal subjects but on coronations, royal marriages, official receptions, pageants, and so forth, frequently with very remote bearing upon international law. The individual "sections," which are the last subdivisions of the "books" and their "chapters," begin with a concise statement of law, usage, habit, or history in bold type, followed by brief factual data or by source material (treaties, reports, and so on), or by both. In so far as the bold-type statements are legal in nature, they often pertain to domestic public law, for example, to questions of succession to the throne. To give a few instances of statements on international law, his bold-type headlines touching neutral trade at sea (Book 20, chap. 2) read as follows:

Sec. 40. *There arise not infrequently many and grave controversies on the commerce of neutral ships with the countries of the belligerents.* [There follow eighty-five pages reciting diplomatic notes on such controversies.]

Sec. 41. *In such controversies often much remains obscure on either side.* [There follow eight pages of reference to smuggling and the text of a French complaint to the English government on the condemnation of a French ship by an English prize court.]

Sec. 42. *Dependent upon the kind [Beschaffenheit] of the states concerned and upon the time and circumstances, the outcome of such controversies varies very much.* [There follows a half-page comment, with no

mention here or elsewhere of prize courts, despite the French note referred to in Sec. 41. No other information on the issues involved is offered.]

While this manner of treatment, at least on principle, is in accord with Moser's purely factual or "observational" approach, he does state, from time to time, distinct rules of international law. Thus we find in the discussion of embassies (Book 4) these statements:

Chap. 15, sec. 7. *No action lies against an Ambassador in the courts of the country in which he resides.*

Chap. 19, sec. 5. *Persons belonging to the Ambassador's retinue are as inviolable as the Ambassador himself.*

Chap. 19, sec. 8. *On the other hand, an Ambassador is answerable for his retinue and liable to damages for their misdeeds.*

Substantiating the first rule, controversial in Moser's time, Moser produces only a newspaper report on an English case; the second and third rules are not documented at all; actually at least the third lacks foundation.

The instances are typical of Moser's method. His statements of law, though proffered as "positive" law, are largely devoid of adequate proof.

As a matter of fact, his enterprise was bound to fail. While his provincial environment limited his outlook, and his literary sources were obviously scanty, by far the largest part of his material is excerpted from a kind of political magazine, the *Mercure historique et politique*. More important, he was entangled in a fundamental error: the law cannot be perceived as a traveler perceives the shifting scenery. Observation can be no more than the first step in building up a legal discipline.

Though Moser was far from pursuing philosophical interests, it is very probable that English empiricism, through its general influence upon the intellectual climate of the period, influenced his approach. Still, this cannot fully explain his peculiar point of view, which is a complete surrender of judgment. One has to take into account a German conception, which was later termed *beschränkter Unterthanenverstand* (the limited comprehension of the common man)—a conception deepened by Lutheran-Pietist ideas, which in worldly matters stand for indulgence of, and subordination to, the government. Moser emphatically disclaims being a "*raisonneur*," who would gauge the actions of sovereigns by his shortsighted or farsighted con-

ceptions in state affairs. Again and again he stresses the utter insignificance of his or any other private individual's opinion in such matters: God will judge the actions of sovereigns on Doomsday.

To the political and religious features there must be added a congenital quality of mind which made Moser a born collector and registrar. He was perhaps one of the first scholars to use an elaborate system of index sheets. But he was conspicuously lacking in the powers of theoretical analysis and scientific systematization. Nor is there much evidence that the tremendous factual material compiled by Moser was actually used by later writers. What has remained is his basic doctrine, which sprang from his innermost qualities and convictions. For the first time in the history of the law of nations Moser posited the fundamental methodological problem: speculation, or reliance on actual state practice. His answer, though unsatisfactory, was a most salutary and most effective challenge, as was his idea that the law of nations ought to be considered as a European, rather than a universal, phenomenon. He also perceived the difference between the law of nations and domestic "public external law," though he did not always observe it.

In German literature Moser occupies a distinguished position, principally as a venerable figure in public life and as a writer on German public law; but his name has become known also outside Germany. A noted English writer even calls him "the real father of modern international law."¹²⁴ While this is beside the mark, Moser had a noteworthy share in the evolution of the positivist school of international law.

A greater achievement in a similar line of thought was that of another German, Georg Friedrich von Martens (1756-1821).¹²⁵ As a writer, von Martens belongs to the pre-Napoleonic period, during which his literary opus was virtually completed. With him the "heroic" era of the science of international law seems to have come to a close, being followed by the era of professionalism.

Born in the Free City of Hamburg to wealthy patrician parents, he obtained the degree of Doctor Juris in 1780 from the University of Göttingen. Thereafter for almost two years he made informatory journeys to Wetzlar, seat of the Reichskammergericht, to Vienna, and to Berlin. In 1782 he became, it appears, a Privatdocent (instructor) in the Göttingen law faculty. Of excellent qualifications and

with valuable social contacts, he soon developed remarkable skill in securing positions, titles, and high salaries. He became an associate professor before his first teaching year was over, and thereafter rose rapidly in the elaborate academic hierarchy, to be for some years Dean of the Law Faculty and later head of the University. Still, it seems, a citizen of the Free City of Hamburg, he obtained in 1783 a title of nobility from the Emperor whom he had never served—an elevation recognized in 1789 by the Hanover government, which also, at his urgent request, conferred upon him the title "Hofrat." Thereupon he married a wealthy widow of the same rank and title. In 1798 he aroused widespread opposition by publishing a zealous and offensive pamphlet upholding his government against one von Berlepsch, a former government official who had been dismissed because of pro-French and anti-English activities, but who was then supported by German public opinion and was, as a matter of law, finally vindicated by the court. It is not too bold to assume that the pamphlet increased the government's benevolent attitude toward von Martens. However, after the French invasion he quickly shifted to the Napoleonic kingdom of Westphalia, in whose administration he soon obtained a high position. At the end of that short-lived creation of Napoleon's, he re-entered the service of the kingdom (former electorate) of Hanover, becoming in 1815 its envoy to the German Bundestag, that permanent committee of the German states which had as its preeminent task the suppression of the liberal and national movement in Germany. In this connection von Martens made himself conspicuous, especially on the occasion of the demands of the Elector of Hesse to have the sale of domains by the defunct Westphalian government invalidated—demands unaccompanied by willingness to compensate persons who, on the order of the Westphalian government, had added to the public property through services or otherwise. It was then that von Martens made his historical utterance that by the establishment of strictly legitimistic principles German subjects ought to be discouraged from assisting an invading enemy. Not a good argument from the mouth of a man who had aided the king of Westphalia.

Von Martens's first important publication was a brief provocative study in German under the suggestive title *Essay on the Existence of a Positive European Law of Nations and on the Advantage of This Science* (1787).¹²⁶ While the restriction to the positive European law of nations points to Moser, it is significant for the dominance of the

natural-law doctrine that von Martens found it still necessary to explain the existence of a positive law as well as the usefulness of discussing it. In 1789 his main work appeared, the *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage*.¹²⁷ The positivist approach, proclaimed anew in the title, led him further to the preparation of his famous *Recueil*, begun in 1791,¹²⁸ and of the *Cours diplomatique; ou, Tableau des relations extérieures des puissances de l'Europe* (1801), containing a repertory by states of treaties and statutes relating to foreign affairs, as well as statistical data. He also published in German *Accounts of Memorable Controversies of the More Recent European Law of Nations* (1800–1802).¹²⁹ This was the first “casebook” in the field. In contrast to the modern Anglo-American casebook, the number of judgments reported was very small because of the prevailing scarcity of published court decisions, especially in the continental countries. In 1795 a careful monograph by von Martens on the law of captures appeared.¹³⁰ He wrote also *Outlines of Commercial Law* (1795),¹³¹ the first textbook on this subject. It dealt mainly with bills of exchange and private maritime law, which are the principal objects of cosmopolitan legal development; their association with international law in von Martens’s writings suggests the Roman idea of *jus gentium*. Apart from a bald outline of European foreign relations, published in 1807, he practically ended his literary work in his early forties, an unusual phenomenon. His ambition, always somewhat extraneous to scholarship, definitely turned to different goals.

Von Martens’s academic pursuits unfolded in a similar way. He first gave himself to his teaching duties with great devotion. Reassuming Moser’s pedagogical ideas, he organized for his students practical courses in diplomacy which were conducted on a high level and won wide repute. However, the higher von Martens rose in the academic hierarchy, the more absorbed he became in administrative and semi-diplomatic functions. His resignation as a professor came in 1808 as a natural development.

In his scientific work, von Martens has been rightly classified as a positivist. He took a rather extreme stand by postulating that in order to ascertain the positive law of nations, one has to examine in each particular case merely the special relations prevailing between the two states concerned. He did considerable work along these lines, especially in his monograph on capture. However, he admits what one

might call the contagious effect of treaties and usages of the Great Powers, an effect evidenced by the similarity of so many treaty provisions and usages generally employed in European state practice. On this basis, according to von Martens, there can be formed by way of "abstraction" a theory of a *general* positive European law of nations which has taken shape since the close of the Middle Ages and more definitely since the Peace of Westphalia. This European law of nations extends to American, but not to Turkish, territory. A *universal* positive law of nations, he asserts, has no reality at all; only a natural law would be universal.

All this is in line with the teachings of Moser, whose influence is also reflected in von Martens's lengthy discussions on ceremonials. Being aware, however, that the rules of ceremonials differ in character from the bulk of the law of nations, he terms them "usages." The latter, he assumes, comprise only "imperfect"—that is, in his terminology, moral—obligations.

The positivist trend in von Martens's teachings is further indicated by his emphasis on "external public law"—a term introduced, as we have seen, by Moser. According to von Martens, the external public law of each state is composed of natural and positive law, and it constitutes the most important part of the law of nations. He thereby obliterates, much more than Moser, the fundamental difference between the domestic law relating to foreign affairs and the law of nations prevailing among the states (*inter gentes*).

As appears from what has been said, von Martens recognized a law of nature but relegated it, much as Rachel did, to the field of morality. At variance with Rachel, however, he did not attribute a religious quality to it. Apparently he relied on Kant who had just clarified the difference between law and morality. Nevertheless, he not infrequently, and especially in the discussion of neutrality, referred to the law of nature as a point of legal argument. For instance, he thought this law sufficient basis for such dubious assertions as that noncontraband enemy goods on neutral ships are not subject to capture, much less the ships themselves ("free ship, free goods") and that the same is true of neutral noncontraband goods on enemy ships ("enemy ship, free goods").

Von Martens also points to the necessity of sufficient legal reasons for waging a war; but he admits that each nation has to follow its own judgment regarding the justness of its cause, and that wars "between

nations" must be considered as just on both sides with respect to the treatment of enemies, military arrangements, and peace. Nor does he attribute any other legal effect—in the law of neutrality or elsewhere—to the criterion of the justness of war. His remarks are a rather perfunctory and thoughtless reiteration of traditional doctrine. One may consider as a new feature von Martens's tenet that a state may intervene in domestic crises of a foreign nation if "called in to aid by the party which has justice on its side," and even without such call on the ground of a special right or simply on the ground of self-preservation. Apparently, the Austro-Prussian intervention in the French Revolution was in his mind when he set forth this interventionist thesis, which is obviously more political than legal.

A conspicuous feature of von Martens's system is his conception of "absolute" or "primitive" or "natural" rights of states. These are rights derived from the law of nature and are distinguished from "acquired" rights—an elaboration of Wolff's theory. Among the rights of the first group are those of territorial sovereignty (he still speaks of *propriété*), of independence, of equal treatment, and, strangely, of aggrandizement.¹³² This is what was later called the doctrine of "fundamental" rights of states. While writers at all times have disagreed on the types and number of "fundamental" rights of states, the doctrine itself became dominant in the nineteenth century and is still supported in many influential quarters, especially in the Western Hemisphere.¹³³ Undoubtedly it has stimulated scientific discussion and promoted the systematization of international law.

Von Martens's doctrine differs from Wolff's in starting from "rights" rather than "obligations." While the emphasis upon the obligation had already been weakened by Vattel, the emphasis upon the right, indicating a more aggressive spirit, appears first in Grégoire's *Déclaration*. The *Déclaration*, it is true, was one *du droit des gens* rather than *des droits des nations*, but fundamental rights were implied and in part expressly set out in it. The influence of Grégoire's *Déclaration* on von Martens's thought is therefore unmistakable. This is perhaps the reason why he inveighed, in one of his most brilliant and spirited discourses,¹³⁴ against the vulnerable and unsuccessful pronouncement of the French revolutionary leader, from whom he very definitely wanted to dissociate himself.

Von Martens's main merit lies in the literary aspects of his work. His presentation of the rules of international law is distinguished by

succinctness, precision, and elegance of language; characteristically, he preferred French to German. His documentation is far superior to Moser's. True, specialized inquiry into the factual aspects of international law had not advanced enough in his day to offer the desirable amount of evidence; but his references to modern writers are carefully selected and rather evenly allocated among the several hundred sections of the book. Examples from biblical or ancient history are absent, as are virtually citations from the *Corpus juris*. Nor are there references to judicial decisions—a divergence from Anglo-Saxon method which became more noticeable in the nineteenth century. On the whole, arbitrariness and uncertainty of statement are less apparent in his book than in natural-law tractates.

Another noteworthy feature of von Martens's *Précis* is the system. Like Moser, he begins with a discussion of the politico-legal structure of Europe; but from that point on he follows a new path, analyzing one after another the various modes of acquiring an international right (namely, through treaties and otherwise); the various international rights (of nations as well as of sovereigns) as such; the negotiations and embassies; the defense and prosecution of international rights (through war or reprisals); and, briefly, the extinction of international rights. This system has rightly been subjected to criticism, but von Martens at least has the merit of having thrown overboard the organizational principles taken by earlier writers from Roman law or from scholastic doctrine, and of having tried for the first time to arrange the topics of international law in conformity with its intrinsic structure.

All in all, the *Précis*, despite its lack of original ideas and of clarity in fundamentals, was the best systematic exposition of international law of von Martens's time and for long afterwards; and it is certainly a "classic" of international law. He himself prepared three French editions (1789, 1801, 1821) ¹³⁵ and the German edition of 1796. There are three posthumous French editions, of 1835, 1858, and 1864. An English translation of the first edition, by Cobbett, was published in 1802 at the request of the American government; the Preface stated that the President, the Vice President, and every member of Congress were subscribers, and that there were few libraries in the United States in which the work could not be found (?). Four other English translations appeared between 1802 and 1829.

In the first half of the nineteenth century and beyond, the *Précis*

led in the science and teaching of international law; and it established the prevailing pattern of systematic treatment of international law. Among statesmen and diplomats, it is true, Vattel's *Droit des gens* as an "oracle" seems to have far overshadowed the *Précis*, which—essentially a textbook, with many disjointed sections—does not make easy reading. Still, as a scholarly achievement, the *Précis* is definitely superior to the earlier treatise.

In order to evaluate von Martens's entire influence upon later generations, his other works on international law, and especially his *Recueil*, must likewise be taken into account. They suggest, even more than the *Précis*, methodical inquiry into the history and other facts of international life as a basis for the science of international law. By imparting scientific form and potency to Moser's unhewed and unwieldy ideas, he achieved progress which could never be lost.

We shall not delve into the general literature opposing the natural-law doctrine of the period. Suffice it to cite Bentham's famous pronouncement: "A great multitude of people are continually talking of the law of nature: and then they go on giving you their sentiments of what is right and what is wrong: and these sentiments, you are to understand, are so many chapters and sections of the law of nature." ¹³⁶ This was not said with an eye to international law, but the history of the latter certainly furnishes ample documentation for Bentham's thesis.

CHAPTER VI

From the Congress of Vienna to World War I

MAIN POLITICAL AGREEMENTS AND DECLARATIONS

The Napoleonic Wars were brought to an end by the Congress of Vienna,¹ whose "Final Act"—the peace document—was dated June 9, 1815. Signed by the representatives of Austria, France, Great Britain, Portugal, Prussia, Russia, and Sweden—the alphabetical order being a salutary innovation in diplomacy—the treaty fixed the grand lines of the political map of Europe for half a century, that is, until the unification of Germany and Italy, and in a measure even for another half-century. The new German Confederation which it established in lieu of the defunct Holy Roman Empire was constructed as a permanent league among sovereigns, hence as an institution of international law. Moreover, the Final Act concerned itself in several important respects with general problems of international law. Thus, with regard to rivers separating or traversing several states (international rivers), the principle of free navigation not only for the riparian but for all states was proclaimed, though in an ambiguously qualified way and simply as a standard for future agreements. These agreements were consummated many years later, the most important being the Rhine Navigation Act of 1831, which, however, provided liberty of navigation solely for the riparian countries and their nationals; not until 1868 was more liberal regulation achieved through a revision of the Act.²

Another important problem dealt with by the Final Act of the Congress of Vienna was the suppression of the still flourishing international slave trade. This step had long been demanded by English public opinion on religious and humanitarian grounds. The English government tried at Vienna to obtain international prohibition of the slave trade, but was unable to win more than a condemnation in very general terms. Nevertheless, Great Britain pursued her humanitarian

efforts with firmness, perseverance, and success, concluding a great number of treaties which finally culminated in the comprehensive and effective General Act of the Anti-Slavery Conference of Brussels, 1890.³ The various treaties exhibited interesting features, such as the right of warships to visit and search suspect ships of any nationality; some of the earlier treaties also provided—unsuccessfully, it seems—for the establishment of international tribunals for the adjudication of seized ships and for the emancipation of their human cargo.

The Vienna conference was more fruitful in the field of diplomacy. An appendix, amended by the Protocol of Aachen (1818), to the Final Act regulates the rank of diplomatic agents in a manner which has virtually persisted up to the present. The first group includes ambassadors and papal legates or nuncios, who alone are considered as having “representative” character; the envoys, resident ministers, and *chargés d'affaires* form the second, third, and fourth groups. Furthermore, under the Protocol of Aachen, self-assumed titles of sovereigns or states require, in international relations, recognition by the other states.

In a special convention of November 20, 1815, closely connected with the work of the Congress, the powers recognized and made themselves guarantors of the neutrality of Switzerland,⁴ which had been heavily infringed upon during the Napoleonic Wars.

Among the great number of states participating in the Congress, Austria, England, Prussia, and Russia—the “tetrarchy”—were dominant. They were the Great Powers: a political rather than a legal term, which was extended to France in 1818 when she was admitted to the dominant group, thus turning it from a “tetrarchy” into a “pentarchy” (a development which in more than one respect brings to mind analogous events of 1945). Earlier, in the Treaty of Chaumont (March 1, 1814), Austria, England, Prussia, and Russia, in forming an alliance against Napoleon, had undertaken to use their means *dans un parfait concert*. As a result, the term “European Concert” was, in common parlance, now transferred to the tetrarchy or pentarchy itself; and, inasmuch as the Great Powers pretended to act in the common European interest, the term came also to refer to the general cooperation, based on international law, of the European nations.⁵

The tetrarchy, and later the pentarchy, acted mainly through “congresses” at which the political destiny of Europe was decided. The Congress of Aachen was one of them; the last was the Congress of

Verona in 1822. From the beginning there were rifts among the Great Powers. Napoleon having been destroyed and new boundaries fixed, the absolutist powers—Austria, Prussia, and Russia—under the guidance of Prince Metternich, were primarily interested in maintaining the absolutist regimes and in suppressing revolutionary movements everywhere by intervention. On the initiative of Czar Alexander I, they united in the Holy Alliance of September 26, 1815, which took its name from its exalted religious language. The three rulers, who signed it personally, announced their “unshakable determination” to take as the rule of their conduct nothing but the prescriptions of the Christian religion, to give one another everywhere and on every occasion assistance and succor “in conformity with the words of the Holy Scriptures,” to consider themselves and their nations “as members of the same Christian nation,” and so on. Rulers devoted to the same ideals were invited to join. There was no reference to the law of nations. Whether or not the document had the legal force of a treaty is not clear. The true meaning of its resounding phrases is understood when they are read in the light of the divine-right theory of monarchy; the interventionist idea then emerges in full clarity. As a matter of fact, the main historical action carried out under the auspices of the Holy Alliance was the French intervention in the Spanish revolution against the corrupt absolutist regime of Ferdinand VII (1823); because of England’s dissent, it marked the end of the congress system of the Alliance. The deathblow was dealt to the Alliance by the uprising of the Greeks against the sultan, a movement in which Prince Metternich, consistently with the true spirit of the Holy Alliance, sympathized with the Mohammedan sultan rather than with the Christian Greeks.⁶

In the Americas, the Napoleonic Wars and the ensuing actions of European diplomacy had repercussions which were to long outlast the Holy Alliance as well as the pentarchy. The temporary dethronement of the Spanish Bourbon dynasty in the French-Spanish campaign of 1808 kindled in the Spanish-American colonies revolutionary movements which culminated in the formation of independent republics. Brazil’s rise to independence (1822) was likewise a sequel, though a belated one, of the Napoleonic invasion of the Iberian Peninsula. At the same time the emergence of the “Latin American” states brought about, or at least was a prime cause of, another historically important event.

In connection with the planned intervention in Spain, the powers of the Holy Alliance had, at the Congress of Verona, envisaged intervention in the former Spanish colonies with a view to restore there the rule of the Spanish kings. To such schemes, Monroe, the President of the United States, in his message to Congress in 1823, declared firm opposition in what has become known as the Monroe Doctrine.⁷ Setting forth for the United States a policy of nonintervention in European conflicts, President Monroe announced—and this is the core of the Monroe Doctrine—that an attempt on the part of the allied powers (namely, the members of the Holy Alliance) to extend their system to any portion of the Western Hemisphere would be considered as dangerous to the safety of the United States and that the latter would view any intervention by a European power for the purpose of oppressing the new American states or controlling in any other manner their destiny as “the manifestation of an unfriendly disposition toward the United States.” In addition, the message, citing Russian claims to territory south of Alaska, stated that the American continents could “no longer be considered as subjects for future colonization by any European power.”

A few writers have asserted that the Monroe Doctrine violates the law of nations because it goes beyond the right of self-preservation of the United States. Still, assuming a nation's right of self-preservation, we can hardly describe as unlawful a farsighted use of it in the sense of *principiis obsta* within reasonable limits. At any rate, the right of the United States to pursue the policy contained in President Monroe's message has never been contested by any government on legal grounds.⁸ The Covenant of the League of Nations (1919), Article XXI, gave the Doctrine a somewhat qualified recognition by the provision that the Covenant did not affect the validity of international engagements in the form of “regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” That recognition did not imply any submission to it by foreign governments; nor is such submission found in other acts of state, though Latin American governments sometimes invoked the Doctrine in order to secure political assistance from the United States. On the whole, there is little doubt that the Doctrine, without running counter to international law, has never become a part of it. Still, it has generally met with acquiescence. The military expedition of Napoleon III against Mexico, while the United States had her hands bound by the Civil War, has been the only major attempt to defy it; ⁹ but this very

action revealed its effectiveness; immediately after the termination of the Civil War, Napoleon had to withdraw his troops from Mexico as the result of pressure exerted by the American government. However, the Doctrine as applied from time to time contained a germ of tutelage over the Latin American republics. That situation was increasingly resented by the latter as their consciousness of national independence grew, though this evolution was perhaps largely due to the exclusion of European and Asiatic influences, thanks to the Monroe Doctrine. The United States policy of attempting to counteract Latin American resentment by organizing amicable cooperation on the basis of equality led, in 1890, to a conference of American governments, which by way of resolutions (not by treaty) founded the International Union of American Republics in Washington. We shall return to it in the next chapter, because the Union attained noteworthy significance only after World War I.¹⁰

The proclamation of the Monroe Doctrine and the maintenance of Latin American independence constituted a major defeat of the Holy Alliance; but this did not mean the collapse of the pentarchy, from which England, despite her various dissents, had not withdrawn. In fact, the pentarchy achieved its last important success when it settled the conflict between Holland and Belgium, whose union under the Congress of Vienna Act had been rescinded in 1830 by a Belgian revolution. Under heavy pressure by, and under the guaranty of, the pentarchy powers, the separation treaty between Holland and Belgium was consummated on April 19, 1839. From the viewpoint of international law that guaranty is the most notable feature of the separation arrangement, especially in its connection with the "neutralization" of Belgium, which, after the model of the neutralization of Switzerland, was agreed upon by the treaty and covered by the guaranty.

While the idea of the Concert of the Great Powers was cherished throughout the century, it broke down early in the fifties as a result of the Crimean War, when France and England, diplomatically assisted by Austria, met Russia in battle. The Treaty of Paris of March 30, 1856, which ended the war, is second only to the treaties of Westphalia and Vienna in its importance for the history of international law. Under its terms Turkey, the Sublime Porte, was admitted *à participer aux avantages du droit public et du concert européen*. The

phrase is somewhat obscure and has been subjected to diverse interpretations. In no case did it introduce Turkey into the Concert of the Great Powers, the reference being rather to the wider concert of nations cooperating under international law; the existence of certain prior treaty relations between Turkey and European powers was evidently not inconsistent with the new general admission. From a doctrinal point of view the language used seems to confirm the Moser-Martens notion of the European rather than the universal character of the law of nations (*droit public* in this combination meant international law); but the first important step to overcome this notion was now taken.

At the same time, by a novel application of the then popular term "neutrality" the Black Sea was "neutralized," a concept theretofore reserved for states. That neutralization thinly veiled a painful restriction imposed upon vanquished Russia. The latter, as well as weak Turkey, had to waive the erection of military-maritime arsenals on the littorals of the Black Sea, which was opened to merchant ships but forbidden to men-of-war of all nations. In 1870, during the Franco-German War, Russia shook off these restrictions, and her action was confirmed by the Treaty of London (1871), under which, however, the Black Sea remained open to merchantmen while the closure of the Dardanelles and the Bosphorus to men-of-war was generally upheld. In this treaty, too, all the Great Powers participated. Previously they had acknowledged in a protocol the "essential principle of the law of nations" that a state cannot rescind treaty engagements except with the assent of the cocontracting powers. On the part of Russia, the declaration amounted to a kind of *amende honorable* for her open violation of the Paris Treaty.

The Paris Treaty was more fortunate in creating the International Commission of the Danube, composed of delegates of the Great Powers, of Turkey, and of Sardinia, which had cosigned the treaty. The Commission had to secure the navigability of the Danube estuaries. Its work was successful and came to an end only with World War II. Besides, the navigation of the Danube was declared by treaty open for all states; but again it proved to be impossible to secure the supplementary agreements necessary to render the proclaimed principle effective.

Another noteworthy feature of the Paris Treaty was the fact that the principalities of Walachia and Moldavia (later Rumania)—then

under Turkish sovereignty—were to be newly organized, taking into account the wishes of the populations concerned. Though a plebiscite was not provided, this was the first important treaty to recognize the principle of self-determination as applied to the alterations of the political map.¹¹

By a separate instrument, dated April 16, 1856, the famous Declaration of Maritime Law was issued by the signatory powers of the Paris Treaty. The declaration abolished privateering; prohibited the capture of enemy goods except contraband (which was not defined) on neutral ships, and of neutral goods except contraband on enemy ships; and required blockades to be effective, that is, to be maintained by a force sufficient to actually prevent access to the coast held by the enemy. All the countries of the world were invited to join. In fact, most of the other important maritime countries acceded: for instance, Argentina, Brazil, Japan, and, in 1908, Spain. The United States did not, among other reasons, because it considered privateering as a necessary tool for countries not possessed of a strong navy—a point which later became illusory through the practice of making merchantmen in wartime a part of the navy. Because the United States was practically in accord with the other principles of the Paris Declaration, this has rightly been considered as representing general international law, though its rules have not withstood the exigencies of the World Wars.

After the Crimean War, the unification of Italy and Germany accounted for further changes in the family of nations. In contrast to the unification of Italy, which was effected by the gradual aggrandizement of the kingdom of Piedmont-Sardinia and completed by the annexation of the Papal States in 1870, the corresponding German development went through unusual phases of international law. It started with the German Zollverein (Customs Union)¹² founded in 1833 by Prussia and including Bavaria and Württemberg, as well as a number of smaller states. Most of the other German states joined the Zollverein in the following decades, Austria being excluded. The Zollverein constituted merely a convention appertaining to international law. As such it was based on the equality of the cocontracting states; but inevitably negotiation with foreign powers on its commercial treaties slid into the hands of the hegemonial power, Prussia. Moreover, various federative measures of a legislative or administra-

tive type proved to be necessary; thus the Zollverein was supplemented in 1838 by monetary agreements organizing the circulating media of the Zollverein countries. Prussia also concluded military conventions with members of the Zollverein. In 1867, after Königgrätz, the Zollverein was merged into the North German Federation, thereby shifting from international to constitutional law. The old German confederation dissolved. The relationship of the new federation to the South German states was left on a treaty basis, although with a striking modification. For tariff and customs matters, a parliament was created which consisted of the members of the North German Reichstag and of special deputies elected by the people of the South German states on the same generally democratic principles as those prescribed for the Reichstag elections. With the foundation of the German Reich in 1871 the Reichstag became, to all intents and purposes, the Customs Parliament.

Italy as well as Germany entered the group of the Great Powers, the former in 1867, the latter taking Prussia's place in 1871. While Italy proved to be the weakest among the Great Powers, Germany under Bismarck's guidance became the most influential continental country. This shift in balance was reflected by the Congress of the Great Powers and Turkey held in Berlin in 1878 under Bismarck's presidency, to solve the formidable and threatening Balkan problems that had arisen from the termination of the Russian-Turkish War of 1877. The Berlin Treaty, outcome of the Congress, contributed to international law by adding, through the grant of sovereignty, three new members to the family of nations: Rumania, Serbia, and Montenegro. Moreover, it took a progressive step in the protection of human rights by imposing upon Turkey and the Balkan countries the obligation not to discriminate against religious minorities.

The Congo Conference of 1885, which likewise centered around the Great Powers, was held in Berlin. From the viewpoint of international law the most remarkable feature of its concluding General Act was the perfect liberty of commerce and navigation assured to all nations, signatory or not, throughout the Congo Basin; moreover, the agreement was declared open to accession by other powers with the effect of conferring upon them special rights and obligations. Less important was an international conference held in Madrid in 1880 by the representatives of the Great Powers and of the sultan of Morocco for the purpose of restricting the "protection" customarily

granted in Morocco by diplomatic or consular agents to other persons who thereby became exempt from Moroccan jurisdiction.¹³ In both conferences the United States participated, although it did not ratify the General Act of the Congo Conference. That participation was symptomatic of the fact that from the end of the Civil War the United States was counted more and more among the Great Powers to be consulted in non-American matters also.

The widening, throughout the period, of the area of the law of nations has been variously touched upon in the preceding discussion. This process was particularly marked in Latin America and in the Far East. The Latin American countries, considerably augmenting the number of subjects of international law, formed part of western civilization from the beginning. While the basis was Spanish, strong French and other European influences were present in the revolutionary movement and population factors. Among these influences the idea of international law, appealing anyhow to weaker nations, was readily received in Latin America—an interest kindled by native instinct for novel ideas and for controversy and legal argument. As a result, the Latin American states were already, in this early period, unusually active in broadly conceived and ambitious projects, conferences, and agreements in international law. Unfortunately their endeavor was all too often marred by ostentation and frustration.

The rise of the Latin American states was followed a few decades later by another momentous addition to the family of nations: the entrance of the Far East into the ambit of the law of nations.¹⁴ There, however, the surrounding circumstances were entirely different. The policy of the great Asiatic nations had been based, as we have seen, on a strong determination to maintain the integrity of their indigenous culture and religion by rigid preclusion of European and Christian influences. Chinese seclusion was first encroached upon by the Sino-English Treaty of Nanking (1842), which opened five Chinese ports to foreign trade and established a status of equality between Chinese and British officials of the same rank. Similar treaties with other powers followed, gradually augmenting the number of "treaty ports." The system of Sino-European treaties, as it developed during the century, was characterized by marked inequality to the detriment of China, after the model of the Near East "capitulations." The

treaties, more or less forcibly imposed upon China, had as their objective the attainment of privileges for foreigners on Chinese territory, without reciprocal concessions to the Chinese. As a result, Chinese independence was heavily impaired. The nationals of the treaty powers in China were placed under the consular jurisdiction of their countries; they obtained self-government in certain Chinese settlements; China had to grant to the foreign powers most-favored-nation treatment without reciprocity; her tariff autonomy was destroyed; Chinese converts to Christianity were placed under treaty protection, etc. As a semblance of reciprocal concession one may list a provision of the Treaty of Nanking which made the consuls responsible to China for the good behavior of their nationals—a feature reminiscent of medieval conditions in the near East.¹⁵ The whole device worked under great strain and under innumerable frictions which, owing to China's weakness, led more and more to virtual seizures of Chinese territory by foreign powers. In this situation, the United States, through Secretary of State Hay, intervened in 1899 by proclaiming the principle of the "Open Door," that is, of equal opportunity for all nations in Chinese trade. The program, involving maintenance of Chinese territorial integrity, was unopposed by the other powers, diplomatically at least, though Russia's answer was ambiguous. Like the Monroe Doctrine, the Open Door principle constituted a settled standard of policy rather than a rule of law.

Japanese seclusion was first shaken in 1853 and 1854 by the famous expedition of the American, Commodore Perry; by heavy pressure, he obtained a restricted treaty of peace and amity from the Shogun, then Japan's actual ruler. As in the Chinese situation, further agreements with other powers followed—all in the Chinese pattern one-sidedly favoring the foreign power. However, the Emperor (Mikado), who still held some authority, showed himself hostile to the treaties, and, in accord with the general mood of the Japanese people, embarked upon the expulsion of the foreigners. Only in 1865, after military and naval measures taken by the powers, did he assent to the treaties. Following the accession to the throne of Emperor Meiji and the breakdown of the shogunate in 1867, Japan resolutely accepted the new situation in order to turn it to the country's advantage. As a result of her general policy of modernization, Japan soon won equal footing with the treaty powers through the abrogation of foreign consular jurisdiction and of other discriminatory features of the treaties.

After the victorious peace of Shimonoseki with China in 1895, she rose to the rank of a Great Power, alone among the non-Christian countries.

The unlocking of Siam to Western trade and influence started in 1825 by a narrowly limited treaty with England, which was replaced by one giving England broader powers, along the lines of the Chinese model. Here, again, the United States and European powers obtained similar conventions. The dramatic incidents which marked Chinese and Japanese relations with the Western countries were absent from the Siamese scene.

The expansion of the Western law of nations to the Far East did not involve a fusion of European and Asiatic ideas. The European conception prevailed as to substance and form. The Oriental nations had small success instilling their cherished notions regarding ranks and ceremonials into the new agreements. Nevertheless, the process of expansion in itself divested the law of nations more and more of its "European" character as formulated by Moser and von Martens.

GROWTH OF WRITTEN LAW: THE NEW ERA

The spread of the law of nations during the period was matched and even surpassed by a growth in depth; to wit, by a steady increase and improvement in international canons. The main field of this process was the law of treaties, but the same process also affected the written municipal law of foreign relations. *Political* conventions did not share in the general growth to any great extent. Their number, and especially the number of peace treaties, was hardly greater than in the preceding period. Alliances, it seems, were even rarer, the most famous being the Holy Alliance and Bismarck's precarious creation, the Triple Alliance of Germany, Austria, and Italy (1883). On the whole, more informal modes of political cooperation prevailed. In contrast, nonpolitical treaties multiplied immensely. Among the more important nineteenth century patterns one may mention treaties of commerce, consular treaties, treaties on extradition, on monetary matters, on postal, telegraphic, and railway communications, on fishing at sea, on copyrights and patents. We shall discuss the more significant types in the following sections.

According to a learned Austrian historian about sixteen thousand treaties were concluded between the Congress of Vienna Final Act

and 1924;¹⁶ and an American estimate of 1917 gives the number of treaties then in existence as approximately ten thousand.¹⁷

As a result of this tremendous growth, treaties assumed a more businesslike and technical character.¹⁸ Invocation of the Divinity gradually disappeared even from peace treaties. The circumstantial recitals, common in the treaties of the eighteenth century, of the titles and possessions of the rulers and of the manifold distinctions and decorations of the plenipotentiaries fell into disuse. Under the impact of the doctrine of the equality of states the alphabetical order of the signatures according to the states represented became customary in multipartite treaties. Bipartite treaties were generally drawn in two copies, each signed by one of the parties and allowing the other to take precedence in the textual sequence of the parties (rule of "alternate"—a device sometimes applied to multipartite treaties, by allowing one copy for each state). This practice, too, was equalitarian. While French generally remained the diplomatic language, a strong countercurrent toward the vernacular, already felt in the eighteenth century, became definitely marked. The Final Act of the Congress of Vienna, though couched in French, provided that this fact should not be considered a precedent for future cases, and in 1826 Lord Canning ordered the English diplomats to use English in their negotiations. Bipartite treaties came to be drawn customarily in the language of either country, one of the languages often being made conclusive under the agreement.

More important than these matters of form was the spread of multipartite conventions in the state practice of the period. Earlier periods had witnessed a few compacts among more than two parties—for instance, the Peace of Westphalia. This type of multilaterality, characterized by a closed number of signatory powers, was employed more frequently during the nineteenth century, owing to the many concerted actions of the Great Powers. Yet, while in the past compacts, bipartite or multipartite (aside from the far-reaching Peace of Westphalia), had undertaken the distribution of territories, the delimitation of frontiers, and the regulation of other conditions concerning the particular parties alone, the multipartite conventions of the nineteenth century exhibited an increasing tendency to lay down general rules for the conduct of states. Evidently these treaties—one may recall the provisions of the Congress of Vienna on international rivers and on diplomatic agents, or of the Paris Declaration of Maritime

Law—formed a particularly important group of multipartite agreements, for which the term “lawmaking treaties” has been accepted. In order to enlarge the area affected by this “lawmaking,” treaties ordinarily extended their range of action by providing for the accession of states not originally signatories. Thus the multipartite and lawmaking treaties assumed the further characteristic of being “open” treaties (the frequently used term “collective” is not commendable).

Apart from the dubious case of the Holy Alliance, the Paris Declaration of Maritime Law was probably the first instance of such an agreement.¹⁹ The Declaration, it is true, required no more than promises in the contingency of war, without imposing immediate burdens upon the signatories. A juridically more refined species of open treaty was inaugurated by those conventions which established collective organs designed to transform the treaty partners into a working community. The Geneva Convention of 1864 for the protection of the wounded in war, on which more will be said, had an organizational background which was, however, not yet integrated into the treaty. Integration was first accomplished by the Universal Telegraphic Union of 1865, concluded in Paris by the representatives of twenty states which, in the course of the century, were joined by the great majority of the more important countries, except the United States, where telegraphy was a purely private business, and of other American states. The International Bureau of Telegraphic Administration was established at Berne as the central organ of the Union. The General Postal Union, signed in 1874 at Berne, and styled since 1878 the Universal Postal Union, spread over practically the whole civilized world. The Bureau of the Universal Postal Union at Berne became its central agency. The International Convention on Railway Freight Traffic of 1890, concluded among the leading countries of continental Europe, was opened for accession in 1893, and came to cover practically the whole of continental Europe. A Central Office of International Transports was set up at Berne for the informatory and executive tasks defined by the Convention. In the early twentieth century there were added the International Radio Telegraphic Convention (1906, revised in 1912—its central agency, the Bureau of Telegraphic Administration at Berne) and the Convention on the International Circulation of Motor Vehicles (1909). Thus the various means of international communication proved to be a particularly effective incentive to multipartite, lawmaking, open and organizational compacts.

Another conspicuous type of these compacts was humanitarian in

character. After long and rather futile efforts toward international organization of the fight against cholera and plague, the International Sanitary Convention of 1903 and the Convention on the Creation of an International Office of Public Health of 1907 at Paris took the decisive step of providing for international sanitary agencies.²⁰ Suppression of traffic in women and children formed the object of multipartite and open conventions concluded in 1902 and in 1910. The General Act of the Antislavery Conference of Brussels in 1890 (organs, International Maritime Office at Zanzibar and a special bureau attached to the Belgian Foreign Office) belongs likewise to this group.

Two more types of multipartite treaties made their first appearance by the end of the period, to assume far greater importance after World War I. These were the international labor agreements and the agreements against double taxation.²¹ Multilateral and open treaties prohibited night work for women in industry and the use of white phosphorus in the manufacture of matches (Conference of Berne, 1916), while bilateral treaties pursued here and there broader objectives in the interest of labor.²² Thus an Italo-French treaty of 1904 guaranteed to nationals of the contracting states equal treatment with respect to social protection and insurance. The first agreement against double taxation (that is, against independent taxation by different states of the same person for the same object) was a Prussian-Austrian treaty of 1899.²³

Multipartite arrangements did not find much favor with the United States, mainly because of isolationist tendencies of the Senate²⁴—one of the indications that the early Republic's idealistic conception of international law had grown dim.

In an indirect way, the evolution of treaty law was affected by the shift of many countries from absolutism to parliamentary government. Where the new constitutions made the conclusion of international conventions dependent on the consent of the legislative bodies—they differed on this point—such agreements became harder to reach; on the other hand, the legislative participation tended to strengthen the international obligations assumed. Many new problems sprang from the interaction of constitutional law and international law.²⁵ A typical question was whether a treaty by this act was internationally binding in spite of the fact that a head of state in concluding it had exceeded his constitutional powers. A negative answer would mean that constitutional provisions, interpretations, and practices had

an international effect and directly influenced the rights and duties of the cocontracting state—an undesirable theory. Independently of this issue, which has remained controversial,²⁶ methods were sought by which the circumstantial interference of the legislature could be dispensed with in international arrangements of a particularly pressing nature or of minor importance. Thus, constitutions or legislative enactments would grant, or be interpreted as granting, a free hand to the administration—not only to the head of the state but to the Foreign Office, or, in more technical matters, to departmental chiefs. Besides, international cooperation of political or nonpolitical nature was not predicated solely on the making of formal treaties. The way of coordinated or reciprocal action, without legal tie, frequently proved adequate, especially in the vast field of economic relations. Attempts to secure such action were sometimes made by acts of municipal legislation, rendering the grant of advantages or privileges to other states or to their nationals dependent upon “reciprocity.” This requirement is found as early as the eighteenth century,²⁷ but it assumed greater importance afterward, particularly in private international law.

International conferences²⁸ proved to be efficacious in the establishment of international cooperation and agreements. We know of the Congresses of Westphalia, of Vienna, and of Paris; but it was only in the sixties of the nineteenth century that the modern type of international conference emerged. Congresses of the old type were meetings of sovereigns or their most trusted representatives to consider grave political affairs; they were we know greatly preoccupied with questions of precedence and other ceremonials. The international conferences of the new era, virtually beginning with a postal conference of 1863 and the Geneva Red Cross Conference of the same year,²⁹ were devoted to nonpolitical matters. The delegates were preponderantly, in a broad sense, technicians; and the proceedings, while more efficiently organized (agenda, chairman, committees, etc.), were at the same time more informal. All this had a salutary repercussion upon political meetings of the old congress type; they, too, adopted progressive forms of organization and procedure, abandoning the former emphasis on ceremonials. Even the title “congress” was replaced by the less presumptuous “conference.”

In addition to the multiplication of international conventions, rapidly growing municipal legislation on foreign affairs evolved in this

period. Earlier instances of such "external" municipal legislation, beginning in the Middle Ages, have been mentioned in our discussion,³⁰ but they amount to little if compared with the vast output of municipal legislation on foreign affairs in more recent times. Internationally, such enactments serve notice on other states of the policy the enacting state will follow; and, while in no wise binding upon the other states, they provide some ground to stand on in a diplomatic dispute, especially in refuting a charge of arbitrariness in case of a disputed international conduct. In the democratic countries a desire to limit the freedom of the administration in the critical area of international relations has contributed to the extension of legislative activities in the foreign field.

As instances we may cite municipal legislation on consular service and on extradition; on taxation of foreigners and of assets held by nationals abroad; on customs and smuggling; on punishment of foreign criminals and of criminal acts committed abroad; on navigation on the seas and other international waterways; on civil rights of foreigners; on neutrality; on prize law and procedure; on the application of foreign law, the enforcement of foreign judgments, and, generally, on the other manifold subjects of private international law.

All considered, written regulations penetrated international relations to such an extent that not much was left to custom, which, in the theory of the law of nations, has always held a position equal or superior to treaties. There are, it must be remembered, many international usages or practices based on courtesy rather than on international law, such as exemption of diplomatic agents from customs duties of the receiving state. Common practices of courtesy are particularly found in the field of ceremonials. Still, there do exist international customs in the proper sense of the word, that is, usages binding under international law. Instances would be the exemption of diplomatic agents from judicial jurisdiction and direct personal taxes of the receiving state. Moreover, legislative enactments on diplomatic immunities either refer to, or are interpreted in the light of, international custom. The most fertile field of custom, real or alleged, is warfare; but here even more than elsewhere custom has been the object of controversy, a fact greatly impairing its efficacy. Acts of inhumanity not required for military purposes are generally recognized as violative of the law of nations, but the rule is vague and elusive

under the dominance of the total-war idea. The trials of war criminals after World War II may give it a more specific meaning. Generally speaking, uncertainties have been lessened here and there in recent times by authoritative decisions of international tribunals. An uncontroverted instance of a customary international rule would be the interdiction of piracy, but it no longer has much practical significance.⁸¹

The rise of the written law, international or national, was not steady throughout the period. The great ascent started in the second half of the nineteenth century, especially from the sixties onward, and appeared in most phases of international law. The emergence of multipartite, lawmaking, open, and organizational treaties as well as the new type of international "conferences" was a significant symptom of a profound change in the structure of international law. The spread of multipartite and lawmaking treaties was in itself a momentous phenomenon. "Openness" added universality, or at least breadth of purpose. And, most impressively, a new trend was brought to light by the organizational feature. The latter not only strengthened the effects of openness with which it was ordinarily connected, but the establishment of international administration created another well-spring of international law. In this period international cooperation based on organizational treaties was still limited to relatively narrow objectives; but the remarkable thing is that the same trend toward the new form of cooperation originated from the most diverse quarters, as though ordered by a higher directive. Today there is no doubt that the international organizational endeavor of this period marked the start of a most powerful and auspicious historical movement. The structural alteration of international law is interrelated with the quantitative changes mentioned above—viz., with the territorial expansion of the law of nations and with the numerical increment in treaty law and international conferences. It may well be said that the sixth decade of the nineteenth century saw the birth of a new era of international law. In the last analysis, that era is the outcome of the technological progress which, with ever increasing pace and potency, has gradually reshuffled the whole pattern of human relations. In the international sphere the development and improvement of means of communication have been the paramount factors. That the law should lag somewhat behind events is a general and almost inevitable phenomenon.

The bright picture, one must admit, is marred by the fact that all

the great political treaties of the period have been violated in one way or another with impunity.³² In this respect hardly any progress has been made over earlier centuries. But the new era offers at least the comfort that for every broken treaty there have been a thousand or more unbroken. Of course, the statistical argument has only limited value; but it is preferable to the usual consolation that infractions cannot detract from the law itself. True, the law stands unaltered where a party violates a private contract. However, repudiation of a treaty by a state raises a more complex problem, in which there may be an antinomy between the law's claim of perennial validity, culminating in the maintenance of the *status quo*, and the historical forces pressing beyond the *status quo*, perhaps toward higher forms of human community. The *clausula rebus sic stantibus* is an attempt to legalize that antinomy. Since Gentili, as we have seen, writers have wrestled with the problem. Notwithstanding Grotius' and Bynkershoek's half-hearted opposition, the *clausula* won general recognition, especially during the nineteenth century. Ecclesiastical law, in which the *clausula* originated, offers an interesting parallel. Catholic doctrine considers a Concordat no longer as binding when its maintenance would harm the spiritual interests of the Church. On this the pope is declared to be the sole judge.³³ In the last analysis the same unilaterality exists in secular law. Each state decides by itself whether the facts in a given situation warrant the invocation of the *clausula* (unless a different colorable excuse is preferred). In historical perspective the conclusion is inevitable that, over long periods, the promises made in vital international agreements do not have lasting value. So far, the conflict between the rule *pacta sunt servanda* and the superior forces of historical evolution has defied any attempt at theoretical solution.

TREATIES ON COMMERCIAL AND RELATED MATTERS

Treaties of commerce,³⁴ which, as we have seen, became prominent in the post-Westphalia era, declined in frequency during the Napoleonic period and perhaps through the next decade; but their number grew notably in the decades that followed. Finally the sixties, crucial also in this respect, brought the development to a peak, and treaties of commerce became the most important species of international conventions. The turning point was the Franco-English Treaty of Com-

merce of 1860, often called the Cobden Treaty after the main English negotiator and plenipotentiary, Robert Cobden, widely known as a passionate advocate of free trade and laissez faire. On the French side, Napoleon III and his economic adviser, Chevalier, were the driving force. In this treaty England retained only moderate import duties of a purely financial (nonprotective) character on a limited number of items, while France abolished import prohibitions and reduced her high tariffs to a rate not exceeding 30 per cent of the value of the imported goods. In addition, the two countries granted each other the position of a most-favored nation. England went even farther and abandoned, by way of domestic legislation, protective tariffs without requiring reciprocal concessions on the part of the exporting foreign nations. The Anglo-French Treaty spurred a tremendous movement toward commercial treaties, based more or less on free trade, by keeping down tariffs and by spreading the resulting benefits through most-favored-nation clauses. Unfortunately, that happy period did not last long. At the end of the seventies protectionism was resumed on a large scale. "Autonomous" tariffs were the basis of the protective system, while reciprocal tariff reductions could be obtained by way of convention. The outcome was the "conventional" tariff. Tariff agreements became so much the normal situation between countries having some trade with each other that the absence of such an agreement suggested a state of tension. Tension would turn into "tariff war," where the two countries proceeded, like France and Italy in 1888 to 1890, to raise customs against each other to obtain forcibly the desired conventional tariff.

Numerous commercial treaties of the period embodied, as a valuable inheritance from the past, what one may call an "international bill of rights." The nationals of a signatory power were granted personal and property protection in the other country, free sojourn, admission to trade and industry including the right of permanent establishment, protection from discriminatory treatment in taxation and similar imposts, free access to courts, freedom of worship, and exemption from military service. The inclusion of such noncommercial matters imparted a far greater significance to the treaties of commerce than the term bespoke. Often, because of those wider implications, such official headings were chosen as "Treaty of Friendship and Commerce," or "Treaty of (Friendship), Commerce, and *Establishment*." Moreover, the incorporation of navigation matters would sometimes oc-

casion a caption like "Treaty of (Friendship), Commerce, and Navigation."

In addition to their frequency and to the variety of their important subjects, treaties of commerce acquired a special significance for international law in the nineteenth century through the customary use of certain stock clauses which, in a measure, were a substitute for norms of universal international law. Among them the most-favored-nation clause stands first.³⁵ In the aftermath of the Napoleonic Wars its use became more and more frequent, especially in conventions to which the United States was a party. The Cobden Treaty initiated its common adoption. The clause survived even the free-trade era. It instilled into the commercial treaties, *bipartite* though they were, an element of multilaterality conforming to the spirit of the period.

The most-favored-nation clause may apply, and ordinarily does apply, not only to tariffs but to matters of navigation, to "international bills of rights," and generally to all subjects embodied in the treaty so that each and every advantage granted by state X to the nationals of state Y immediately accrues to the nationals of such other states as have secured from X the most-favored-nation treatment. An important qualification must be added, however. The United States conceived of the most-favored-nation clause from the outset in a narrower sense. According to the American theory, an advantage granted to the nationals of Y in consideration of a concession made by Y to the United States would accrue to the nationals of the most-favored state Z only if the United States should receive from Z the same equivalent as was received from Y. The operation of this "conditional" or "reciprocal" most-favored-nation clause raised vexing questions indeed. Suppose the United States reduced the tariff on Y silk in consideration of a reduction in the Y tariff on American oranges; a lowering of the duties on oranges may, in the Z situation, amount to much less or much more than in the Y situation, not to mention the difficulty of ascertaining the true *quid pro quo* in the Y transaction. Hence, the "conditional" most-favored-nation clause procured for the favored party no more than a contingent bargaining position, and not even that in the case of a free-trade country like England that had no concession left to offer. The American conception was probably influenced by the common-law idea that a valid promise normally requires the giving of a "consideration" on the part of the promisee; in America the transfusion of this idea into the law

of commercial conventions was not hampered by free-trade notions; quite the contrary, it fitted into the ever growing high protectionism of the country. In intra-European relations, however, the unconditional form and interpretation of the clause were entirely dominant, particularly in the period following the Cobden Treaty.

Another stock clause of treaties of commerce promised to the nationals of the other country the same rights, in certain respects, as those enjoyed by the nationals of the promising country. This "national-treatment" clause might or might not supplement the most-favored-nation clause which merely placed *foreign* nations on the same footing *among themselves*. In a law-abiding country it provided particularly strong protection, supplying what we have described as an "international bill of rights." The national-treatment clause was often extended to ships, amounting in this respect to the very converse of the English Navigation Act.

Frequently treaties proclaimed that there should be "freedom of commerce" between the territories of the contracting parties. We are here confronted with a reminder of venerable Vitorian and Grotian conceptions, which still lend to the treaties a shade of humaneness and magnanimity; but the legal significance of the phrase is doubtful. In the context of early treaty provisions it was ordinarily followed by the recognition of the foreigner's right to "enter any rivers, ports, or places where foreign trade is or will be allowed to settle and reside," or by a similar formula. The proclamation of "freedom of commerce" hardly added materially to the particular reciprocal rights of foreigners as specified in the treaties; still it suggested a liberal interpretation.

The United States adopted an isolationist policy in commercial matters more than elsewhere. We have already mentioned her narrow conception of the most-favored-nation clause. More significant, the United States kept entirely aloof from the movement kindled by the Cobden Treaty. Not only did she follow with increasing rigor a protectionist line; she also, to all intents and purposes, refused to conclude tariff agreements.³⁶ In fact, the numerous commercial treaties of the United States contained, with regard to tariffs, no more than a most-favored-nation clause which was no obstacle to tariff increases. At the same time they laid particular stress on the elaboration of the "international bill of rights"; but this was no longer a matter of great importance, as the legal position of foreigners had already greatly im-

proved during the period by way of municipal legislation as well as through the general progress in the attitude toward foreigners.

A special international problem arose with regard to the sugar trade. Overproduction of sugar due to scientific discoveries led after the 1860's to widespread dumping of sugar, promoted by export subsidies and other export bounties. The resulting depression of the sugar market seriously affected the producers. Attempts were therefore made to suppress the practice of bounties by way of conventions.³⁷ A treaty of 1864 had been of a narrowly limited scope and effect, but in 1902 a multipartite and open international sugar convention was concluded on a larger scale. The signatory countries, including the Great Powers of Europe, obligated themselves to refrain from granting bounties to sugar exporters. A permanent committee was established at Brussels as the executive organ. International sugar organization persisted on a changed basis, under which the United States came in, beyond World War II.³⁸

Closely related to the growth of the treaties of commerce was the expansion and transformation of the consular institution.³⁹ As we have seen,⁴⁰ that institution had lost most of its significance after the Middle Ages. In the eighteenth century only a very limited number of states made use of consuls. In the last decades of the eighteenth century, treaties began to put new life into the consular service—a phenomenon which was more noticeable during the nineteenth century. The French writer and statesman Chateaubriand (1768–1848) is sometimes quoted as having said: "The day of the ambassadors is past; that of the consuls has returned." But consuls never supplanted ambassadors, and their great epoch did not really begin until the Cobden Treaty. Numerous consular treaties, often combined with ordinary commercial treaties as "treaties of commerce and consular rights," were concluded; they were supplemented by elaborate municipal enactments on consular law in the manner of Colbert's *Ordonnance touchant la marine*.

On the basis of international agreements a remarkable uniformity of law developed—directly or through the effect of most-favored-nation clauses—rendering the consular institution virtually homogeneous throughout Western civilization. The main features of that common consular law, which is still valid, are the following: The con-

sul is appointed by the government of his home country and must be formally admitted through the "exequatur" of the government of the receiving country. His main function consists in carrying out the commercial policies of his government and in reporting to it on commercial developments in his district, as well as in informing and advising his fellow nationals on commercial matters connected with his district. Many of his normal functions, however, lie beyond the area of commerce: he grants visas; he administers oaths for evidential purposes to the nationals of his state when they appear voluntarily before him; in certain cases, he may appoint an administrator, or may himself serve as administrator, of estates left by fellow citizens deceased within his district; not infrequently he has power to solemnize marriages of fellow citizens. Broad authority is conferred upon the consul with respect to ships of his country which enter a port or otherwise touch the area of his district: he has, for instance, to assist and to supervise the ship, to enforce discipline on board when necessary, and—a remnant of former judiciary functions—to settle disputes between ship officers and members of the crew to the exclusion of local authorities.

Despite the importance of their various duties, consuls are generally not considered as diplomatic agents and do not have diplomatic immunities. Nevertheless, one immunity or another (for instance, from personal taxation and from military and other public service) is frequently conferred upon consuls by express treaty provisions or most-favored-nation clauses. Inviolability of consular archives is almost generally granted in the same way—probably by custom. The consul may display the coat of arms of his country at the front of his office and hoist the national flag.

A special position was accorded to consuls in non-Christian and Balkan countries.⁴¹ In addition to general consular powers, consuls wielded exclusive judicial jurisdiction in criminal and civil cases, as well as police power over their nationals and over other persons to whom they had granted "protection"; natives, in their disputes with persons subject to consular jurisdiction, had to accept the latter. These "judiciary" consuls enjoyed a far-reaching diplomatic status, including immunity in criminal and civil matters, and had sometimes even the right to keep a military guard. The institution of the judiciary consuls followed the medieval pattern of "capitulations" and reached its culmination early in the second half of the nineteenth century. Exemp-

tion from territorial sovereignty was expanded by the development of independent postal, banking, and educational agencies in the country of the mission; in fact, this kind of consular institution tended to assume the character of an autonomous foreign community.

Later in the century, however, the trend fell off and was even reversed. As to Rumania, consular jurisdiction was abolished in 1877; Serbia, during the eighties; Japan, in 1899; in Algeria and Tunis it expired through the establishment of French sovereignty. Where judiciary consulates persisted, their functions decreased. This was true, for instance, of the "protection" which in the Levant and, to a lesser extent, in the Far East had been extended by the consuls to non-nationals on an excessive and offensive scale. This situation was remedied in Morocco by the treaty, and elsewhere in a more informal way. Even more important was the curtailment of consular jurisdiction through the creation by treaty of mixed tribunals composed of native and foreign judges for the adjudication of cases in which a foreigner was a party. In Turkey mixed tribunals of rather imperfect structure were set up as early as 1847;⁴² but their independence and functioning were greatly impaired by the obligatory supervision or, rather, control of their activities by the dragomans of foreign ambassadors and consuls. A more carefully planned system of mixed tribunals—in fact, a well organized one—was set up in Egypt in 1876. Besides three mixed tribunals of first resort, an Appellate Court in Alexandria was formed, Egyptian judges being everywhere in the minority. Special *codes mixtes*, on the model of the French codes, were prepared for application by the mixed tribunals, and no room was left in the proceedings for interference by foreign dragomans.

Notable though the judiciary consuls were in legal history, numerically they represented a small fraction of the formidable consular organization which was built up during the period. In its last decades every large commercial state, and even some small ones like the Netherlands, had hundreds of consuls abroad. There were consuls general (heading several consular districts), consuls, vice consuls and consular agents, with distinctions varying according to municipal legislation. The difficulties inherent in the formation of such a large body of officials were reduced by the fact that the governments would frequently find among the residents of the consular district distinguished or ambitious businessmen willing to serve in consular capacity at little or no salary, without giving up their principal occupation.

Frequently, governments appointed as nonprofessional consuls persons who were not their subjects. Actually, the great majority of consuls consisted of nonprofessionals, except for the distinctly professional group of "judiciary" consuls. However, during the last decades of the period the larger states replaced the nonprofessionals more and more by professionals.

In 1910 a German writer on consular matters ⁴³ published the following statistics:

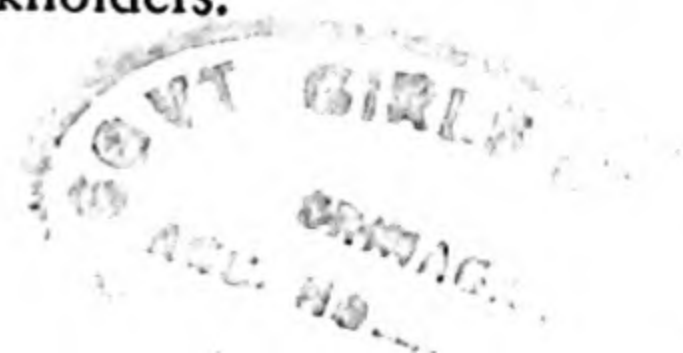
	<i>Professional Consulates</i>	<i>Nonprofessional Consulates</i>	<i>Total</i>
Great Britain	210	600	810
Germany	142	640	782
United States	304	299	603
France	217	633	850
Netherlands	22	500	522
Belgium	45	563	608
Austria-Hungary	111	415	526
Russia	123	300	423
Italy	103	690	793

It is interesting to set these statistics—which bear upon consular institutions rather than upon consular officers—against the following figures furnished by the same writer. In 1885 Germany had 65 professional consulates (increase of more than 100 per cent by 1910), and 580 nonprofessional consulates (increase of about 10 per cent by 1910), while the total number of consulates in the same period rose from 645 to 782, that is, more than 20 per cent. It is certainly a good conjecture that with the other great nations the trend was similar, though probably less pronounced. Undoubtedly the nonjudiciary type of consul accounts for the rapid increase in the number of consuls throughout the period.

Another type of treaty widely affecting international commerce was the monetary.⁴⁴ Monetary treaties were not frequent. However, because of the basic significance of money, they present an illustrative legal aspect of the historical trend toward the formation of com-

posite (regional) units. The movement for uniformity of media of payment in larger areas was first reflected by the German Monetary Convention of 1838⁴⁵ which fixed a ratio between the standard silver coins of the northern and southern German states. The Scandinavian Monetary Conventions of 1873 and 1875 established a common gold standard in Denmark, Sweden, and Norway. More significant was the so-called Latin Monetary Union of 1865 by which France, Italy, Belgium, and Switzerland, under the lead of France, agreed on the joint institution of a bimetallistic system of gold and silver coins having identical weight, fineness, and diameter. All countries were invited to join the convention, which was typical of Napoleon III's liberal economic policies no less than of his restless political ambition: France was to open the way for a world currency as a convenient tool of a free world market. To promote this program the French government in 1867 convoked an International Monetary Conference. However, only Greece, in 1868, joined the Union, while Spain, Serbia, Bulgaria, Rumania, Finland, and some Latin American countries adopted the coin types of the Union without submitting to the other arrangements and, indeed, without undertaking any international obligation in this matter. The Union, an artificial creation, soon passed through serious crises necessitating extensive alterations in its structure, and it came to an end in 1921 owing to the economic aftereffects of World War I. The fact that the members of the Union were outnumbered by countries independently resorting to the coin types of the Union is indicative of the general phenomenon that in monetary matters cooperation and uniformity may well be assured without binding international agreements. This is also evidenced by the international gold standard, which, apart from the Scandinavian Monetary Union, was the outcome of cognate municipal laws enacted by the economically predominating countries. There are, it seems, inherent limitations to the potency of monetary conventions.

In connection with the monetary treaties the first international convention establishing a bank may be mentioned. The Algeciras Act of 1906 settling temporarily the French-German dispute over Morocco created the State Bank of Morocco.⁴⁶ Though the functions of this bank were essentially domestic, it was international not only because it originated in an international agreement, but also because the central banks of the contracting states were its stockholders.



TREATIES ON PRIVATE INTERNATIONAL LAW AND
JUDICIAL ASSISTANCE

The second part of the period under contemplation gave rise to a new and significant development in the fields of private international law and judicial assistance. Concomitantly with the unprecedented migration of business and capital, the demand arose to strengthen the increasing interpenetration and assimilation of national economic systems by appropriate legal measures in the international area. Equality of foreigners before the law was postulated beyond the customary provisions of the treaties of commerce. Mutual assistance in the enforcement of the law among governments and among courts of civilized nations was likewise sought. Although uniformity of the law itself was generally urged only in limited fields, such as the law of bills of exchange, at least the establishment by treaty of uniform principles in the "choice of laws"⁴⁷ was advocated. In the spirit of this program, the Dutch government convoked in 1893 the first Hague Conference on Private International Law, which was followed by five more conferences at the Hague, the last before World War II being held in 1928.⁴⁸ They led to several multipartite and open "law-making" compacts. The Hague Convention on Civil Procedure (1896) was the first. It had rather limited objectives—mainly the release of nationals of any signatory power who might bring suit in another signatory country from the common obligation of giving the defendant security for the costs of the lawsuit in case he should win. Some of the treaties concluded from 1902 to 1905 were concerned with international aspects of family law, especially with international recognition of divorce decrees and of the validity of marriages. The signatory powers were all European—including France, Germany, and Italy. These treaties evoked much favorable comment and great hopes, but their success was limited. Disintegration started in 1913, when France withdrew; and the crumbling process accelerated rapidly. The conferences on private international law after World War I were unsuccessful.

A similar fate awaited a more ambitious enterprise which was launched in 1889 at Montevideo by a number of South American governments. Under the lead of Argentina and Uruguay, a series of multipartite treaties (eight in all) on international private law, in-

ternational commercial law, international procedural law (mainly rules of reciprocal assistance among courts) and related matters were signed.⁴⁰ In addition to the governments named, only Bolivia, Paraguay, and Peru ratified, and even these did not ratify them all. The treaties, which gave rise to vast literary discussion, had only slight practical effect. In 1940 an attempt was made to revive them by way of extensive amendments, which were signed but not ratified. This is in line with the observations made earlier on Latin American efforts in the international field. In Europe a few bipartite conventions proved to be more efficacious, among them the treaty of 1869 between France and Switzerland concerning jurisdiction and enforcement of judgments, which, rooted in the centuries-old friendship between the two countries, is still almost entirely in force—showing a vitality infrequent in treaties and unique in this particular matter. Common-law countries did not participate in that kind of international regulation.

A different picture is presented by the great conventions on industrial and literary property which likewise originated in the later part of the period.⁵⁰ They pertain to private law, as they protect patents (rights of inventors) and trademarks (industrial property) as well as copyrights of authors and artists (literary and artistic property). The treaties were organizational in character, a feature found ordinarily only in public-law arrangements: an international bureau of industrial property was established at Berne, Switzerland, in 1883 and of literary property in 1886. Most of the civilized countries of Europe and the other continents joined the conventions, the main exceptions being Russia, China, and Latin American nations (Brazil became a member). The United States joined the convention on industrial property in 1887; but it never acceded to the Berne organization on copyrights. Foreign authors and artists in the United States and American authors and artists in other countries are protected only on a reciprocity basis. Argentina was ambitious enough to establish a multipartite organization of her own by a treaty of 1889, to which Paraguay and Bolivia as well as France, Germany, Italy, and other non-American countries adhered.⁵¹ Among the Montevideo conventions this treaty seems to be the only one to have produced a notable practical effect.

Generally speaking, the disparity between civil law and common law made itself heavily felt in conventions on private law. For instance, not a single common-law country joined the Hague Conven-

tions of 1896 and 1902-1905, which were practically drawn up in civil-law terms. Because of their terminology, courts trained in the spirit and terminology of the common law could not be expected to handle them adequately; and the same would be true of common-law terminology in civil-law countries. That difficulty, however, was, and is, not an absolute one. It is negligible in matters which have evolved in modern times independently of Roman-law or common-law backgrounds, such as patents or copyrights. The adverse attitude of the United States—not shared by England, Canada, and other common-law countries—toward copyright conventions must be taken as another instance of an internationally negative attitude.

In criminal law, judicial assistance and enforcement of judgments raised special problems.⁵² There extradition of criminals was the cardinal issue. The modern law on the subject originated in the nineteenth century. We have seen that there had been extradition of fugitives from foreign countries since antiquity; but those fugitives had been political adversaries or unlawful emigrants rather than criminals.⁵³ In the eighteenth century we encounter many agreements for the extradition of military deserters. Treaties on the extradition of criminals were still vague and infrequent. This can be explained by the smallness and multiplicity of independent territories, the low level and local character of criminal procedure, and the persistent religious antagonisms which, in matters such as extradition, would make Protestants suspicious of the motives and procedures of Catholic states, and vice versa. As a matter of fact, the few extradition compacts of the eighteenth century worth mentioning were between states of the same creed, such as a Franco-Spanish treaty of 1765 which paid heed to Catholic ecclesiastical law, or the Anglo-American (Jay) Treaty of 1794 whose extradition rule was greatly limited, however, inasmuch as it affected only murderers and forgers. A Franco-Swiss extradition treaty of 1777 was an exception; but it was an extension of an earlier agreement between France and the Catholic cantons and must be explained in terms of the particular nature of Franco-Swiss relations, already noted. In the post-Napoleonic period, however, the impediments to extradition treaties vanished more or less, while at the same time the rapid improvement in means of communication favored the activities as well as the flight of criminals. As a result, new extradition compacts appeared even before the "new

era," and they grew so fast that in the last decades of the period every important country found itself in a network of them. England, anxious to remain an asylum for political refugees, did not follow a policy of extensive extradition agreements until the last decades of the nineteenth century.

Extradition treaties were all bipartite. They provided for extradition in respect to specific crimes, rather than employing general and sweeping terms. "Political" crimes were almost invariably excepted—in striking contrast to the practice of former centuries, when extradition was looked upon primarily as a matter of politics and was therefore freely inflicted on political enemies of the foreign sovereign whose favor was courted. The reverse policy was foreshadowed by the French Revolution, which offered asylum to foreigners persecuted "for the cause of liberty." A new course was definitely inaugurated by Belgium which, arisen herself from revolution, interdicted by a law of 1833⁵⁴ the extradition of "political" criminals. Extradition of military deserters, the foremost extradition type of the eighteenth century, survived only in rare cases. Except for England and the United States, most countries likewise rejected extradition of their own nationals, because of overemphasis upon sovereignty and distrust of foreign courts.

Belgium, also set an example in that her extradition statute, was the first to protect the rights of the defendant by an orderly procedure. Such statutes thereafter were adopted in many countries.

The practical significance of the new extradition law depended, of course, on the particular treaties, enactments, policies, and practices of the countries in question; it was considerable in Franco-Belgian relations. Generally, however, circumstantiality and the expense of the prescribed legal procedures greatly curtailed the effectiveness of extradition.⁵⁵ This was the price paid for its transformation into a legal institution.

INTERNATIONAL DISPUTES

International disputes of a financial nature were characteristic of the period, which was marked by a heavy infiltration of European capital into the economic systems of undeveloped or backward countries.⁵⁶ This movement of capital was primarily in bonded loans floated through stock exchanges. In most cases it contributed greatly to the

economic progress of the recipient countries, particularly in Latin America and the Balkan Peninsula. To the lending capitalists it offered a high rate of interest. The significance of these migrations of capital was not confined to their immediate financial effects; they secured to the creditor country economic and political influence in the debtor country. France, which was outstanding among the capital-exporting states, was the first to draw these financial processes into the orbit of public law by subjecting the stock-exchange trade in foreign securities to government regulation in 1880. But this was municipal law. International law was affected when the foreign state, being itself the debtor or the guarantor, did not live up to its obligations, and thereupon creditors in the prosecution of their claims obtained the protection of their governments. In a number of cases the debtor governments, under the pressure of the incomparably stronger creditor powers, had to submit to international financial control. This happened particularly to Tunisia in 1869, to Egypt in 1876, to Turkey in 1880, and to Greece in 1898. The control was exercised by mixed commissions which—while otherwise widely differing in structure—were dominated by the representatives of foreign governments or creditors. In Egypt and Greece the commissions were composed of nationals of the European Great Powers who acted, to all intents and purposes, as a distinct group. However, the debtor governments did not invariably feel obligated to assent to measures which in fact amounted to their political incapacitation. Among the Latin American states, under the lead of the noted Argentine jurist Calvo, the view was taken that in a state's insolvency foreign creditors were not entitled to a higher degree of protection than domestic creditors, who had to submit to the domestic rules and regulations applicable to such a contingency.⁵⁷ Moreover, Calvo denounced, not without justification, the forcible prosecution by foreign governments of their nationals' financial claims as an easy pretext for aggression and conquest—the classical instance being Napoleon III's ill fated Mexican expedition of 1861, which was ostensibly undertaken on behalf of claims by French citizens against the Mexican government for nonpayment of bonds and of other private-law obligations. In the spirit of the Calvo doctrine Latin American governments proceeded to insert in concession contracts and other agreements with foreigners (not, however, it seems, in loan contracts) the so-called Calvo clause, under which the foreigner renounced diplomatic interposition by his home

government in respect to rights arising under the contract—a clause which international tribunals for the most part held ineffectual in one way or another, principally on the ground that a private citizen cannot validly waive rights of his government. It must be noted, however, that the governments of the creditor countries were by no means uniformly prepared to espouse the cause of their nationals against defaulting foreign states. As early as 1848 Lord Palmerston, then English Foreign Secretary, took the stand that to the British government diplomatic interference was a matter of discretion rather than of international right. Appropriately he pointed to “imprudent men who have placed mistaken confidence in the good faith of foreign governments,” and who could not expect to be protected by their governments from the consequences of their imprudence.⁵⁸

An international solution was attempted by the Second Hague Peace Conference of 1907, which resulted in the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts—frequently called the Porter Convention after the American delegate, General Porter. This treaty provided that in the collection of contract debts owed by one state to nationals of another there was to be no recourse to armed force, unless the debtor state should refuse submission to arbitration or should fail to carry out the award. The Argentine Foreign Minister, Drago, relying on the teachings of Calvo, had taken the stand that, as a matter of principle, armed intervention for the collection of public debts of a state was not permissible; the overdrastic measures employed by some European countries against defaulting Venezuela⁵⁹ played a particular role in the discussion. The Convention amounted to a compromise between this “Drago Doctrine” and the views of the creditor nations. Its most remarkable feature was its support of compulsory arbitration within the province of contract debts—which, of course, is only a small segment of international relations. The subject soon lost much of its importance because the nineteenth century conception of the supreme sanctity of property rights was gradually waning, a psychological change which made warlike measures for the protection of private interests of bondholders and other capitalists more and more a matter of the past.

Otherwise the settlement of international disputes by arbitration was successfully employed in this period.⁶⁰ The United States, follow-

ing the tradition of the Jay Treaty, was the foremost sponsor of arbitration. She caused arbitration clauses for standing mixed commissions on the Jay model to be incorporated in treaties with Ecuador (1862), England (1853, 1871), Mexico (1839, 1848, 1868), Peru (1863, 1868), Spain (1795, 1819, 1871), and Venezuela (1866, 1885). The United States and Mexican Mixed Commission of 1868 was by far the most important; between 1871 and 1876 it settled more than two thousand claims. The United States also agreed to a number of individual arbitrations.

Next to the United States, England showed the most favorable attitude toward arbitration. While the United States was far in the lead with respect to mixed commissions, England was more often a party to isolated arbitrations, a fact which must be appraised in the light of the wider ramifications of England's foreign relations. France lagged considerably behind the two Anglo-Saxon powers in the use of arbitration, but was in turn far ahead of Sardinia-Italy, which had the next best record. Among the other powers Chile and Peru participated to a relatively great extent in arbitration. Russia had the least satisfactory record among the Great Powers, certainly during the nineteenth century.

The most famous arbitral decision was rendered in 1872 between England and the United States in the so-called *Alabama* case by a tribunal composed of an Italian, a Swiss, a Brazilian, and one national of each litigating party. At that time the United States demanded damages from England on the allegation that during the Civil War England had violated her duties as a neutral power, particularly by permitting the ship *Alabama* to be built in an English shipyard and thence to be put to sea for use by the Confederate Navy. By a treaty signed in 1871 in Washington, certain rules (the Washington Rules) coinciding to a large extent with the American viewpoint on the duties of neutrals in naval war were agreed upon for application by the tribunal; the English attitude, favorable to the Confederacy, made English concessions after the defeat of the Confederacy inevitable. The rules pronounced an obligation of neutral governments to prevent the equipping of ships presumably destined for warfare against a belligerent and to prohibit the use of their waters as a basis of naval operations or military supplies in the belligerent's favor. On these grounds the tribunal held England liable to pay the United States compensation of \$15,500,000. The case was rightly considered as a

proof that arbitration was possible, even among the most powerful nations and with respect to intricate problems of grand policy; as a matter of fact, England had originally refused arbitration because the issue affected her honor, of which she considered herself to be the sole judge. Nevertheless, it appeared that neither England's submission to arbitration nor the final adjudication in any way reflected on her prestige.

England and the United States faced each other in another important arbitration, the case of the Bering Sea. The United States, as the successor of Russia, claimed, over England's protest, the exclusive right to seal-fishing in the Bering Sea even outside the territorial waters of Alaska, and had detained English ships which had taken seals in the Bering Sea. The decision of the arbitral tribunal ("Joint Commission"), which consisted of two Englishmen, two Americans, a Frenchman, an Italian, and a Norwegian, was rendered in 1893; it was virtually in favor of England and eliminated a controversy that had aroused strong irritation between the two countries.

Another grave dispute settled by arbitration was that between Great Britain and Venezuela over the boundaries of British Guiana and Venezuela.⁶¹ After the dispute involving valuable lands had been drawn out over decades, Great Britain yielded to arbitration in 1897 only under heavy pressure from the United States, which intervened on the ground of the Monroe Doctrine. Arbitration was agreed upon in a treaty signed in 1897 at Washington, which, as in the *Alabama* case, incorporated a rule of international law (adverse holding or prescription during a period of fifty years shall constitute a good title). The arbitral tribunal was presided over by the noted Russian writer on international law, F. de Martens. The award gave Great Britain practically the whole of the disputed territory, but reserved for Venezuela the important estuary of the Orinoco River. No legal justification of the decision was apparent, and no reasons were given. The award was a political compromise, arrived at by a reprehensible proceeding of de Martens.⁶²

Another case of major interest was the Anglo-Brazilian dispute originating in the arrest by Brazilian authorities of three officers of the English frigate *Forte*, who, while on a pleasure trip in mufti in a Brazilian town, had a quarrel with a Brazilian sentinel. The next day they were released upon the intervention of the English consul. The incident occurred during a period of Anglo-Brazilian tension and

on the heels of another conflict. Dead sailors of the English three-master, *Prince of Wales*, wrecked on the Brazilian coast, had been found on land, apparently looted. When the Brazilian government did not immediately satisfy the English demands made in connection with these incidents, an English squadron seized several Brazilian ships by way of reprisal. Finally, the governments, having severed diplomatic relations, submitted the *Forte* case for arbitration to the King of Belgium, who, in 1863, rendered an unqualified decision in Brazil's favor. The award seems to have had a remarkably salutary effect upon political relations between the two countries.

Next to the *Alabama* case these three arbitrations are among the most conspicuous of the period. They exemplify arbitrations between government and government as distinguished from the typical American mixed-claims-commission cases, where claims of individuals against the foreign government were involved. It should be noted, however, that such claims too were derived from international law, and that from this point of view mixed-claims commissions must be distinguished from international institutions like the Egyptian Mixed Tribunals, which were concerned with claims between individuals, based on commercial or other private law.

With respect to intergovernmental arbitration, progress of general significance was made by a gradual change in the method of electing arbitrators. Through the greater part of the nineteenth century, heads of states were frequently, if not preferably, made arbitrators. To mention a peculiar instance, in the American-Mexican agreement of 1839, the umpire in case of a tie vote in the Commission, was to be the King of Prussia, who was then the utterly unintelligent Frederick William III.⁶³ Upon his death, which came before the beginning of the arbitration, his successor decided no fewer than fifty-seven of the seventy-two cases brought before the Commission. Later in the century the arbitral decision was ordinarily entrusted to jurists or diplomats, singly, or more often in groups—an evolution suggesting an approach toward a more judicial, and therefore sounder, conception of international arbitration.

For the first time in history, arbitration in a number of cases made necessary the collaboration of common-law and civil-law jurists, and the occasions for such cooperation multiplied in the twentieth century. Theoretically, one might expect that great difficulties would arise from their joint endeavors: common law insists much more on for-

malities in pleading; its rigid rules of evidence are unknown to civil law; the rule of precedent has much less weight in civil law; and, in the interpretation of agreements, a common-law court is more inclined than a civil-law court to adhere to the terms of the instrument and less inclined to consider also the surrounding circumstances. Actually, these and other differences were little felt in the collaboration of the two groups. In general, the broader approach of the civil law was followed; the old English conception of international law as a derivative from the civil law may have been a factor.

The fact that disputes between governments had to be decided in "isolated" proceedings by arbitrators appointed *ad hoc*, rather than by standing tribunals, marked a backward stage in legal development. However, the second part of the period saw the first attempts at judicial organization in international law. The General (Universal) Postal Union of 1874 and 1878 provided permanent machinery for the arbitral settlement of disputes between members of the Union, that is, between postal administrations.⁶⁴ Each of the contesting members had to elect as arbitrator another member not involved in the dispute; in the case of a tie vote the administrations so chosen had to elect another administration as third arbitrator. This institution was employed several times in the nineteenth century and much more frequently thereafter. Another international association in the field of communications, the (European) Association of International Railway Freight Traffic of 1890, similarly entrusted its central office with the decision of disputes between member railroads;⁶⁵ but this arrangement had a somewhat different character because the railroads were to a considerable extent private corporations, among which several belonged to the same country.

The initial step toward the creation of a general international tribunal was taken by the First Hague Conference of 1899. A convention for the Pacific Settlement of International Disputes, adopted by the Conference and ratified by all of the Great Powers, as well as by many other powers established the so-called Permanent Court of Arbitration at The Hague,⁶⁶ which, unlike the later Permanent Court of International Justice, was merely an administrative machinery plus an official panel of arbitrators from which the contesting states, should they wish to do so, might choose for any particular case an equal number of arbitrators. The arbitrators together with

the chairman, for whose selection a special procedure was provided by the Convention—a crucial point—formed the “tribunal” (as distinguished from the “Court” in its entirety); its members had diplomatic status. Ratification of this Convention, which was remodeled in 1907, involved no commitment except for the insignificant costs of administration, yet the creation of the Court greatly stimulated the conclusion of arbitration agreements. More than one hundred and twenty general agreements of this type were consummated by 1914. An Anglo-French treaty of 1903 deserves particular attention. It barred from arbitration questions of vital interest, independence, and honor—a reservation adopted by many later treaties. Not all the agreements led to actual arbitration, and, even when they did, not all were entrusted to the Permanent Court; but the latter was then the outstanding instrumentality of arbitration. It rendered fourteen awards during the period under consideration; six more were handed down after World War I.

One of the first decisions of the Permanent Court was delivered in 1904 between Germany, Great Britain, and Italy as plaintiffs and Venezuela as defendant in a case involving preferences for the payment of Venezuelan bonds and compensation for damages suffered by nationals of the powers in a Venezuelan revolution. These claims were recognized by the tribunal; they had been pressed by the powers through a blockade of the Venezuelan coast, through seizure of Venezuelan ships, and other warlike reprisals. Perhaps the most conspicuous award was the one by which the Court in 1909 disposed of the extremely dangerous German-French dispute on the Casablanca (Morocco) incident, in which French authorities had frustrated the attempt of the German consulate to remove German and non-German deserters of the French Foreign Legion from Morocco by ship. The award was mainly in favor of France.

The end of the period witnessed the establishment of another Permanent Court, the Central American Court of Justice,⁶⁷ set up in 1907 on the regional basis indicated by its name. The Court, sponsored by the United States, was to serve Central American republics in litigation of various kinds. In 1917, on a complaint brought by Costa Rica and El Salvador against Nicaragua, it rendered two decisions declaring a treaty made by Nicaragua with the United States (the Bryan-Chamorro Convention) for the construction of an inter-oceanic canal to be violative of the complainant's rights. Because the

United States was not a party to the proceeding, the judgments proved to be nugatory and actually led to the cessation of the Court's activities, which had been narrowly limited in scope (ten cases altogether) and in part not very fortunate. The failure of this Latin-America creation was all the more discouraging as the close historical, geographical, and ethnical ties of the Central American states, not to speak of their exiguity, seemed to offer good chances for success.

Apart from the cases decided by the Permanent tribunals, it may be estimated that during the period under consideration more than two hundred and fifty arbitral proceedings took place between governments, with a heavy increase in the last decades. The overwhelming majority of the proceedings led to awards or to settlements. In some instances, however, arbitration agreements were repudiated at the outset so as to prevent arbitral proceedings; and approximately twenty cases are known in which an award was temporarily or definitely disobeyed.⁶⁸ The exception raised—ordinarily “excess of power” by the tribunal—was at least in some cases well founded, while in others it served rather as a pretext for disobedience. Most of the controversial awards led eventually to amicable settlements. An almost incredible degree of corruption was revealed, in the case of the American-Venezuelan Commission of 1868, on the part of an American and a Venezuelan commissioner. The awards rendered by this Commission were belatedly set aside under a convention of 1885 by a new Commission.

Arbitral tribunals are not the only instrumentality of international law for the settlement of intergovernmental disputes. The same convention which created the Permanent Court of Arbitration at the First Hague Peace Conference provided for an International Commission of Inquiry designed to clarify controversial facts by impartial and conscientious investigation without rendering a decision on the dispute itself. It was the first machinery set up for a purely fact-finding inquiry into international disputes. In 1905 the Commission successfully handled the Anglo-Russian dispute caused by Admiral Rozhdestvenski, who, as commander of the Russian fleet on its way to Japan, had fired off the Dogger Bank at English trawlers which he believed to be Japanese torpedo boats. Two fishermen were killed and considerable damage was caused. The findings of the Commission induced Russia to make indemnification, but at the same time removed

the basis for punishment of the admiral demanded by England.

An almost desperate attempt at pacification was undertaken shortly before the outbreak of World War I by the American Secretary of State, Bryan, through the conclusion of bilateral conventions "for the Advancement of General Peace," sometimes inaccurately labeled Bryan Arbitration Treaties. In conventions of this type the United States and the cocontracting state obligated themselves to refer their future disputes to a permanent international commission for investigation, and not to resort to war until the Commission should have delivered its report within a definite period; in other words, the agreements were designed to create a "cooling-off" period. A number of these treaties were signed prior to the outbreak of the war, and about twenty were ratified afterwards, primarily by Latin-American republics but also by Great Britain, Italy, Russia, and other non-American countries. The plan failed entirely, but it was symptomatic of the anxiety of the years preceding the outbreak of World War I.

HUMANIZATION OF WARFARE

While progress of arbitration opened a way toward a reduction of armed conflicts, another success was attained through international measures for the humanization of warfare.

In the eighteenth century, as we have seen, international arrangements in this grave matter had been few and unsatisfactory. Conditions in the early nineteenth century were similar, if not worse. The noble idea proclaimed by the French Revolution that wounded soldiers, friend or foe, should be treated alike seemed to have been forgotten. Remarkably, one finds a vestige of it in the history of Latin America where, in the war against Spain, the theories of the French Revolution proved to be a source of inspiration. In an agreement made in 1820 at Trujillo between Bolívar and the Spanish commander, the principle of the indiscriminate treatment of the wounded was expressed in exalted language which bespoke its revolutionary origin.⁶⁹

The honor of having brought about a decisive turn for the better goes to Jean Henri Dunant of Geneva,⁷⁰ son of a patrician Calvinist family, whose religious and philanthropic traditions he passionately followed from the days of his youth. On a journey undertaken for personal reasons Dunant became an eyewitness of the battle of Solferino where on June 24, 1859, three hundred thousand French and

Austrian soldiers fought each other with a loss of forty thousand dead or wounded. Since the wounded were almost unattended, thousands who might easily have been saved died after horrible suffering on the battlefield, or were even buried alive. In a small volume, *Un Souvenir de Solferino* (1862) Dunant, appealing with great force to the conscience of humanity, gave a striking account of the harrowing things he had seen. He proposed that an international organization of national associations, in collaboration with their governments, should stand ready in case of war to take care of wounded and sick soldiers. The book stirred public opinion. A distinguished Geneva society formed a committee of which Dunant was a member, with the object of convoking an international conference of governmental representatives for the discussion of his proposals. On behalf of the committee he embarked on a far-flung personal campaign and succeeded in winning influential sponsors for his plans. In October, 1863, the conference took place in Geneva; nearly all the European states, including the Great Powers, were represented. While the representatives had no authority to bind their governments, they agreed on the creation of internationally connected national associations, as planned by Dunant. In a most felicitous move, the red cross on a white ground—the reverse of the Swiss colors—was chosen as a mark of distinction for the new organization. At the same time the conference recommended—this, too, can be traced to a suggestion by Dunant⁷¹—a much more ambitious plan for securing international protection of the wounded, military hospitals, and military medical personnel. This program was adopted by a congress of government plenipotentiaries, meeting at Geneva in 1864 on the invitation of the Swiss Federal Council. Again Dunant was helpful in the preparation for the congress. The Geneva Convention,⁷² officially called “Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,” adopting the symbol of the Red Cross, proclaimed the “neutralization” of the wounded, the ambulances, the military hospitals and their personnel, and promised respect and liberty to private persons caring for the wounded; as in earlier compacts, the personnel of ambulances and hospitals were accorded the right to return to their armies. The states not represented at Geneva were all invited to adhere to the agreement, and it was soon ratified by England, France, Italy, Prussia, Spain, and a number of other states. Austria acceded only after the lost battle of Königgrätz in 1866. The Papal

States became a party in 1868, the last among the European countries. The United States followed in 1882, but not until after a long and vigorous crusade by Clara Barton,⁷³ one of those idealistic and strong-willed women who, in various phases of this country's history, have contributed to its social and moral progress. There was, however, never any opposition to the ideas of the Geneva Convention in this country; quite the contrary. The obstacle lay in the American tradition, then still very strong, of keeping aloof from European "entangling alliances," to employ a slogan of Miss Barton's opponents.

The beneficial effects of the Convention soon appeared in the wars following its formation, and were in general gratefully recognized. Nevertheless, in the early period of its existence, the Convention was frequently violated by military and medical officers unfamiliar with its provisions; in other cases, undoubtedly willful contraventions occurred. Because this was the first step in a new direction, it was only natural that the Convention should function imperfectly; for instance, it did not extend to war at sea, nor did it provide for the protection of prisoners of war. The Red Cross itself, however, soon grew into one of the most flourishing humanitarian institutions of the world.

Dunant had no share in these happy developments of his ideas. In 1867 he had fallen into bankruptcy because excessive imagination—a quality rather valuable in his humanitarian endeavor—had led him into fatal business mistakes. Owing to conditions not fully elucidated (perhaps because he did not want to accept help), he lived in Paris for many years after in extreme poverty and despondency. In the early seventies his voice was heard from time to time in support of various, if sometimes fantastic, humanitarian enterprises. Thereafter for fifteen years he vanished entirely from the public scene. In 1890 we hear about him again, living frugally on a small pension paid to him by a benevolent physician, in Heiden, a little Swiss town; respected and befriended by a few people, he suffered from delusions of persecution. The last eighteen years of his long life he spent in the Old Men's Home of Heiden where he occupied a small clean room. In this solitude he was "discovered," when he was sixty-seven years old, by a reporter who published an account of the meeting in a widely read German magazine. Suddenly the world remembered Dunant. Gifts and attentions of every kind, including a life pension from the Dowager Empress of Russia, showered down upon him. His

sixty-eighth birthday was a national Swiss event, and Pope Leo XIII sent him his picture with an inscription. But Dunant did not leave his abode or change his frugal way of life. When seventy-three years old he was awarded half of the first Nobel Peace Prize. At the age of eighty-two he passed away peacefully in seclusion. His life, like that of his countryman J. J. Rousseau, illustrates the fact that a mentally abnormal and almost psychopathic person may very well be an exceedingly valuable member of human society.

About the time the Geneva Convention was planned, another important step toward humanization of warfare was taken through the *Instructions for the Government of Armies of the United States in the Field* ("General Orders, No. 100") issued in 1863 by President Lincoln. Their basis was a draft prepared in the spirit of Grotius' *temperamenta* by Dr. Francis Lieber, a political refugee from Germany and Professor of Public Law at Columbia College.⁷⁴ The *Instructions* were the first attempt to check the whole conduct of armies in the field by precise written rules; they have favorably influenced the law of warfare beyond the United States, and served as a basis for later international negotiations and arrangements.⁷⁵ The contemporaneousness of the *Instructions* with the foundation of the Red Cross is a further remarkable instance of the significance of the early 1860's as a turning point in international law.

Another attempt at normalizing and improving the general law of war was made by an international conference convened in 1874 at Brussels by Czar Alexander II. It failed completely, but the fundamental idea—which may be traced back on the Russian side somehow to Alexander I's Holy Alliance—was revived by Czar Nicholas II through the convocation of the Hague Peace Conferences. At the first of these conferences (1899), previously discussed, the Russian government sought principally a limitation of armaments—a measure in which it was particularly interested for financial and other reasons. On this score the conference failed again; but in addition to the establishment of the Permanent Court of Arbitration it accomplished two conventions of signal importance: (1) on the Law and Customs of War on Land; and (2) on the Adaptation of the Principles of the Geneva Convention to Maritime Warfare. The first convention was concerned mainly with prisoners of war, whose life, health, and property it protected, and with the exercise of military power in

occupied enemy territory. In the latter respect, the convention limited the occupant's power by imposing upon him the duty of maintaining, unless absolutely prevented, the laws of the occupied country; of respecting family honor and the rights, lives, property, religious convictions, and worship of the inhabitants; and of exempting them from participation in military operations against their own country. Among the other humanitarian provisions of the convention the rules against the use of poison and poisoned weapons, against the bombardment of hospitals and undefended places, may be especially mentioned; in the case of a siege or bombardment of an inhabited place, buildings dedicated to worship, art, science, and charity were to be spared as far as possible.

The agreement on the Adaptation of the Principles of the Geneva Convention to Maritime Warfare dealt mainly with the functions and the protection of hospital ships and with the extension of the status of prisoner of war to shipwrecked, sick, or wounded persons who, in maritime warfare, might fall into the hands of a belligerent.

The conventions were supplemented by three "declarations" prohibiting (1) the use of expanding (dumdum) bullets; (2) for a period of five years, ending in 1905, the launching of projectiles and explosives from balloons; (3) the use of projectiles diffusing asphyxiating or deleterious gases. (The difference between "conventions" and "declarations" is obscure.) The two conventions and the declarations were binding only where all of the belligerents were parties to the respective convention or declaration (general-participation clause). The declarations were not ratified by Great Britain; but apart from this the Great Powers as well as many other important states ratified both the conventions and the declarations; among the outsiders were Argentina, Brazil, and China. In both World Wars the general-participation clause made the agreements inapplicable because they had not been ratified by all of the belligerents. Nevertheless, the belligerents decided in general to abide by them.

The new arrangements were clearly in the spirit of the Geneva Convention of 1864; they, too, constituted landmarks in the history of the law of war. As to the Geneva Convention itself, the Conference expressed a desire for its revision, which was actually carried out in 1906 by an international conference held at Geneva on the invitation of the Swiss Federal Council. The convention rules were considerably improved and augmented; among the innovations were the obliga-

tions imposed on belligerents to keep each other advised of deaths, admissions to hospitals, and other facts concerning the sick and wounded, as well as the duty to declare punishable, by proper legislation, acts violative of the Geneva Convention, such as the unauthorized use of the Red Cross in peace or war. Another change was of a special juridical interest. The text of 1864, as was seen, had declared the wounded and the personnel of the medical army service as "neutrals." These persons were, of course, not really neutrals, but duty-bound to their country; rather were they entitled to respect, protection, and care. The "neutralization" language was now expunged. Again, all the Great Powers and numerous other states ratified. If a belligerent had ratified only the 1864, and not the 1906, convention, the former remained binding upon him.

In 1907 the second Peace Conference convened at The Hague on the initiative of the United States, which had left the formal invitation to the Russian government. The Final Act of the Conference encompassed no fewer than thirteen conventions, yet they were much less efficient than those of 1899. Three of the 1907 agreements amended the conventions of the first Hague Conference; another, proposing an International Prize Court, was never ratified. Two agreements dealt with the rights and duties of neutrals in war on land and on sea; they favored the neutrals in a fashion that would seem unrealistic in the light of later experiences. For instance, the neutrals were not supposed to prevent the manufacture, transit, or export of arms for belligerents or to restrict them in the use of telegraph or telephone on neutral territory. Another agreement tried to revive declaration of war as a prerequisite to armed hostilities.⁷⁶ Furthermore, there was the Porter Convention which we have already discussed. The remaining agreements dealt with various aspects of war at sea.⁷⁷ One of them, concerned with the right of capture in maritime war, granted, among other things, inviolability to neutral and belligerent mailbags, including those of an official character, which was another indication of the then prevailing exalted ideas on neutrality and, generally, on the potency of international law in wartime. While the great majority of the more important states acceded to the agreements of 1907,⁷⁸ the outsiders included Italy—which was, however, a party to the 1899 Convention—Argentina, and China. (Since the general-participation clause had been preserved in the

agreements, the outcome in the World Wars was the same as mentioned before.)

The draft convention on the International Prize Court had as a sequel a Naval Conference held in 1908-1909 in London for the purpose of formulating an international prize law, without which the proposed court would obviously be unable to work. The Conference prepared an agreement known as the London Sea Law Declaration or, briefly, the Declaration of London which, again in a spirit favorable to neutrals, set out to regulate such matters as blockade, contraband, transfer of flag, convoy, and visitation of ships. Though the elaborate agreement was not ratified, it nevertheless attained a certain legal significance. Signed by all the Great Powers, it stated in the preamble that its provisions agreed in substance with the generally recognized principles of international law; and in World War I the belligerents, on the initiative of the United States, first applied the convention with diverse modifications and reservations; but this state of things ended in 1916 when England and France formally withdrew from the declaration.

WORLD WAR I ⁷⁹

The war opened ominously with the flagrant violation of Belgium's neutrality by Germany, one of the guarantors of that neutrality through succession to Prussia's obligation of 1837. On the other hand, England soon took a step the validity of which was highly questionable under international law, by declaring the North Sea a "military area" and laying mine fields there. This meant that neutral ships, unless guided by the English, would enter the North Sea at their own peril. By way of retaliation, Germany decreed the waters around England, Scotland, and Ireland to be a "war zone" (*Kriegsgebiet*), similarly precluded to neutrals. This measure, with its menace to England's civil population, was answered by England with what has been called the "long-distance blockade": all passage of neutral vessels to and from Germany by sea was to be barred with the ultimate objective of preventing any commodities from entering or leaving Germany by sea. That step again was a departure from the recognized principle that a blockade must be effective, unless it is to be interpreted as an infinite and again legally unwarrantable stretching of the contraband list.⁸⁰ Neutral ships were subjected to visit and search

in English control ports or to equivalent measures: from a purely military point of view a concession, one which Germany did not or could not offer. On the contrary, Germany, invoking again the right of reprisal, sharpened her submarine warfare, main tool of enforcing her "war zones," to the extent that vessels, enemy or neutral, if met within a "war zone" would be torpedoed without previous warning, because such warning might expose the submarine to attack and destruction. The sinking of the British liner *Lusitania* on May 7, 1915, was the most shocking example of this type of warfare. Many among the more than eleven hundred victims were Americans.⁸¹ Another feature of this new kind of warfare was the revival of the ancient law of angary. Neutral ships were requisitioned by belligerents (particularly England and the United States), but neutral powers (Italy, Portugal, Brazil) likewise resorted to that right by requisitioning German ships.

The Rousseauan conception of the war as a contest between governments only, which we know had still prevailed in the Franco-German War of 1870, was entirely abandoned for the notion of "total" warfare. Not only were life and health of the nationals of the belligerent countries affected by the maritime confinements, but air attacks were undertaken more and more against places inhabited by civilians, and generally against nonmilitary objectives. Seizure or confiscation of private enemy property was practiced on the largest scale, with the Allies taking the lead.⁸² This was done on the basis of municipal legislation, which also prescribed the internment of enemy nationals.

Impairment of neutral rights was even more conspicuous than in the Napoleonic period. The establishment of military areas or war zones, the long-distance blockade, and the unlimited submarine warfare were vigorously protested by the neutral powers, including the United States prior to its entry into the war. But ultimately the pressure upon neutrals proved to be irresistible. Many of them had to submit to "rationing" by the belligerents of their own consumption with a view to severing all their trade relations with Germany. Thus World War I marked the beginning of a definite trend toward the weakening of the law of neutrality.

Generally speaking, however, international law was by no means abandoned altogether in World War I. Barring minor incidents, not only were the inviolability of envoys and generally the diplomatic immunities respected, but on the whole international law still served

the neutral states widely as a guide and as an accepted justification of their policies. Regarding the international law of treaties, the belligerents themselves professed to abide by the Geneva (Red Cross) Convention, the Hague Convention on the Laws and Customs of War on Land, and by other international agreements; by and large, their practice was not inconsistent with their pretensions. Violations were apparently frequent on both sides, but in many cases the underlying facts and their correct interpretation are uncertain and controversial; mistakes were often in the nature of isolated facts, and to a certain extent the broad language of the conventions gave a colorable legal excuse to shocking acts. Undoubtedly international law enjoyed a much higher respect than in World War II, although in the latter even the Hitler government prior to its last months of agony observed in a measure its obligations under the Geneva Convention and, as far as prisoners of war were concerned, under the Hague Convention.

DOCTRINE OF INTERNATIONAL LAW: POSITIVIST TRENDS

In the science of international law, the nineteenth century was the great era of positivism. This means, first of all, that the conception of the law of nature and the kindred one of just war were to all intents and purposes abandoned—the consummation of a process which, as indicated, had started in the eighteenth century. The science of international law was now definitely conceived of as legal or juridical; it was severed from philosophy, theology, and considerations of policy, all of which had been ingredients of the law of nature.⁸³ Generally, a clear line of demarcation was drawn between the actual law of nations and the law of nations as it ought to be. Moreover, the art and technique of diplomatic pursuits—that is, diplomacy—were distinguished from international law, which remained the competent discipline for the inquiry into legal relations of diplomatic agents. Differentiation was also pushed forward within the legal realm. The general inadequacy of private-law concepts in the problems of international law came to be recognized; references to the *Corpus juris* disappeared in learned argumentation. Private international law definitely attained the position of an independent discipline though some authors still treated it, not very successfully, in systematic works on the law of nations. As a result of the severance of the two disci-

plines, the term "public international law" to express the distinction between the law of nations and private international law gained currency. (Nevertheless the phrase "international law" remained generally synonymous with "law of nations.")

The purification of doctrine reflected the demands of state practice. The rapidly growing role of international law in diplomatic transactions rendered the modernization of outdated doctrine and methods of presentation an urgent matter. The science of international law was to be technically refined so as to best fulfill its particular task in the regulation of human affairs.

Besides the changes in state practice, broad movements of legal and political thought were influential in the advance of positivism. The battle pro and contra the law of nature was fought along all the fronts of legal and political science. On the European Continent, where the doctrine of the law of nature had won such notable triumphs, it not only was defeated but fell into utter disrepute. Political bias was a factor in this phenomenon: the law of nature, having furnished the conceptual weapons for the French Revolution, became an easy target for the theorists of the counterrevolution. Moreover, the speculative methods of the natural-law school harmonized but little with the intellectual atmosphere of a century in which physical science had so conspicuously demonstrated the value of observation and painstaking research. In international law, too, theories had to be based upon the solid foundation of fact.

Still, the assembling of facts could not satisfy the searching mind. It was necessary to establish a theoretical basis of positivism as had been tried, although with scant success, by Rachel. A fresh attempt at reorientation was undertaken by John Austin (1790-1859),⁸⁴ the founder of the English "analytical" school of jurisprudence. Following Hobbes, Austin defined the "law properly so-called"—in his opinion the only pertinent object of jurisprudence—as the command by a sovereign to persons subject to him, the essence of the sovereign's supremacy consisting in his ability to enforce obedience. Consequently, international law was not "law properly so-called," because there is above states no superior with the authority and power to enforce obedience to his commands. Austin therefore classified international law as a non-law, as "positive morality" together with such rules as those of honor and of fashion. ("Positive" means the opposite of "natural" or "speculative," as in the phrase "positive international

law.") The rules of "positive morality" were all "imposed by general opinion of any class of society," and, especially, international law by the opinion of the large society formed of the various nations. International law, then, "consists of opinions and sentiments current among nations generally." However, Austin is aware of the English notion that the law of nations is "the law of the land." He therefore admits that international law becomes law properly so-called—namely, municipal law—to the extent that its rules have been adopted by the courts or legislatures of a given country. Natural law is entirely eliminated in the Austinian system.

It is important to note that Austin was not a "denier" of international law. In no way did he question the existence or the value or the efficacy of the rules which are generally denominated "international" law. His problem was one of analysis and of classification. In this effort, as well as in his rejection of the law of nature, he was influenced by the German school of legal science, which is connected with the name of Savigny, and which he had studied on the spot.

Austin's work was impaired by personal difficulties. With little ability or inclination to differentiate the more important from the less important, he tended to drift into overwork and confusion; sad failures in his profession and growing personal dissatisfaction and inhibitions followed. He published his fundamental views in 1831 and 1832, but, through the nearly three decades of his later life, he did not succeed in giving his system a coherent and unified shape. His lectures on jurisprudence were posthumously compiled and edited from various materials left by him. The book is therefore uneven and repetitious; it is also inordinately discursive and dry. All the more is it a tribute to the intrinsic qualities of Austin's thought that up to the present time his theories have held a distinguished place in the literature of international law and political science. However, his lumping together of international law, honor, and fashion evidently was unsatisfactory and was generally repudiated.

More than half a century passed before another major effort was made to tackle the fundamental question of the law of nations from a positivist angle. This was done in 1880 by Jellinek, professor of public law at Heidelberg.⁸⁵ He tried to explain the binding force of international law, and thereby its character as a law in the proper sense, by the hypothesis that the sovereign state, through entering into a legal relation with another state, subjected itself to international

law by an act of "self-limitation," from which the state might disengage itself at any time without violating that law. Still such freely revokable self-limitation could not well supply a sound basis for a law of nations. More important was the work of another German legal scholar, Triepel, which appeared in 1899 under the title *Völkerrecht und Landesrecht* (International and Municipal Law).⁸⁶ According to Triepel, the two laws differ fundamentally in their bases and their sources. International law regulates relations between states, whereas municipal law is concerned with the relations between individuals (private law) or between individuals and the state itself (public municipal law). While municipal law is derived from the will of the particular state, international law finds its source in the common will of the states. International and municipal law are situated on different planes, as it were. An international rule, as such, has just as little effect in municipal law as a municipal rule has in international law. In order to give the international rule effect in municipal law, especially for the courts, it must be transformed into a rule of municipal law by an act of national legislation; only thereafter are the courts bound to apply it. This is the "dualistic" doctrine of international law. It had already been suggested by Austin, but Triepel elaborated it fully, basing it on ample documentation from state practice. He was less fortunate in his analysis of international law itself. The latter rests, according to Triepel, on "agreements" by which the states have laid down identical rules to be observed by all of them; that is, international law rests on what we know as "law-making" agreements, except that Triepel, like Pufendorf and Rachel, included customs as "tacit" agreements. Hence, an international rule, based as it is on the "common will" of the states, cannot be changed unilaterally; in other words, it is binding. But why should the consensus of the states be irreversible for each particular state? This issue Triepel declared to be nonjuridical and therefore outside the orbit of his discussion. He left that cardinal question unanswered. Nevertheless, Triepel's study met with widespread interest⁸⁷ and was translated into several foreign languages.

One may associate with the positivist trend the tendency toward codification.⁸⁸ By definition a code is an authoritative and exhaustive, or at least comprehensive, fixation of the rules composing the contemplated segment of the law. Positivism favors this kind of undertaking because codification establishes a "positive" source for the

codified rules. True, the fragmentary, uncertain, and controversial character of the law of nations should be a deterrent to codificatory enterprises in this field; but enthusiasm prevailed over objections. By the end of the eighteenth century Bentham, inventor of the terms "international" and "codification," had envisaged a codification of the law of nations, though in a utopian and pacifist spirit. Actual attempts at codification started much later. In 1868 there appeared Bluntschli's *Modern Law of Nations Presented as a Lawbook* (*Das moderne Völkerrecht als Rechtsbuch dargestellt*). Unable to present valid rules covering the whole field, he filled the many gaps with what he considered to be the commendable view, without drawing a line of demarcation between law and proposal. The book was a tremendous success. Bluntschli was a person of unusual stature.⁸⁹ A Swiss from Zurich, he had become, after an eventful scholarly and political career in his native country, Professor of Political Science at the University of Heidelberg. In addition to being a historian and political scientist of distinction, he was a statesman and religious leader of liberal and cosmopolitan views, a "good European" who enjoyed friendship and esteem far beyond the two countries of his old and new allegiance. His *Lawbook* appeared in 1868 when he was sixty years of age, and it was received as the mature expression of a humane and cultivated mind. In 1885 Pradier-Fodéré, author of a comprehensive treatise on international law,⁹⁰ asserted, somewhat peevishly it would seem, that Bluntschli's book "is almost the only one which is today consulted by the diplomats and by all those obligated by their profession to possess some notion of international law." The book ran to three German and four French editions; and there were translations into Spanish (by a Mexican scholar), into Hungarian, Russian, and Chinese. None of the other numerous codifiers of the period⁹¹ attained similar prominence.

SPECULATIVE TRENDS; PRIVATE INTERNATIONAL LAW

Despite its distinct predominance, positivism did not rule absolutely during the period. The German philosopher Hegel (1770-1831) devoted a short but impressive section of his *Philosophy of Right* (1821) to international law.⁹² He represents the state as a supreme, in fact divine, entity. Through the medium of the state the "World Spirit," materializing in the respective national spirits, un-

folds itself, rendering the state the embodiment of the Moral Idea. The legal corollary of this metaphysical conception is the incompatibility of legal ties among those exalted bodies. Characteristically, Hegel uses as the caption over his discussion of international law "External Public Law" (*Äusseres Staatsrecht*), a term which we remember connotes basically municipal law. But he also uses the term "law of nations" (*Völkerrecht*) without defining it. There seems to be no difference between the two terms—in juridical exactness Hegel was little interested. As a principle of his "law of nations" he states in the first place that treaties ought to be kept (*sollen gehalten werden*); but at the same time he asserts that the essence (*Wirklichkeit*) of treaties exists solely within the particular wills of the contracting states; the latter are "above their stipulations." Hence the "ought-to-be" has neither a legal nor a moral significance; it flows from some metaphysical quality of the states.

Hegel advances only one other rule of his "law of nations"; viz., that, between states which mutually recognize each other, a bond persists even in war, making the restoration of peace possible. From this premise he concludes that envoys must be respected (also in war), and that war should not be waged against "domestic institutions" or against peaceful family life, or against persons in their private capacities. These Rousseauian propositions do not follow from Hegel's premises nor accord with reality; moreover, his remark on envoys is obscure. But in the onward surge of his thought these are minor details apparently designed to detract somewhat from the horror of war. The core of his vision is clear. His state as an embodiment of the "national spirit" follows only norms of its own and must be guided by the objective of its own good according to its particular interests and conditions. Hegel opens the door to intervention by arguing that a state cannot be indifferent to what is going on internally in another state (more precisely, such internal developments may justify denial of recognition to that state). More radical than Hobbes, he does not integrate in his system man's desire for peace. War is conceived by Hegel as an evolutionary necessity, as the solution of inevitable conflicts; it tends to promote the moral health of the nation. Peace, in the long run, means foul stagnation (*Versumpfung*).

At variance with Hegel's impact upon philosophy and political science in general, his tenets have had little reflection in the literature of international law, particularly outside Germany; but even there

his teachings on the law of nations have not found followers except perhaps for some extreme *Macht* theorists of the period preceding World War I.⁹³

Without any implications as to Hegel's metaphysical tenets, the more traditional "law of nature" doctrine was by no means entirely abandoned in the literature of international law. In 1883 James Lorimer, Professor of the Law of Nature and the Law of Nations in the University of Edinburgh,⁹⁴ published his *Institutes of the Law of Nations*⁹⁵ with its system, a somewhat puzzling one, of international law according to the old doctrine. Lorimer fell back on the idea of a divine and immutable law of nature which is not separated from morality; justice and charity coincide in harmony with the scholastic doctrine of old. Human laws are merely "declaratory" of this law of nature, and the law of nations is "little more than the law of nature as each nation chooses to interpret it." However, the rules of the law of nature are necessary inferences from the *facts* of nature, and the facts—namely, power relations—form the dominant element of the law of nations ("*de facto* principle"). They were for Lorimer a revelation, by the Creator, of the order of the universe. Likening his law of nature to the laws of physical life, he dubbed jurisprudence "a branch of the science of nature."

In accordance with the *de facto* principle, Lorimer held there can be among states no equality since they are unequal in fact. Instead, he—in home politics a violent adversary of equal vote—proposed to have the rights of states measured by their actual power, which includes such elements as "moral and intellectual quality." Similar *de facto* considerations prevail in the recognition of states; a state of "inferior quality" will receive only "partial recognition." Apart from the objective factor, however, recognition is dependent on a subjective (moral) factor; namely, on the intent of the receiving party to reciprocate. Such an intent, Lorimer maintained (in 1883!), cannot be expected from Moslems or from other non-Christian states, and he felt uneasy about Roman Catholicism, which, however, he considered as "moribund" and no longer dangerous. Recognition may be denied also for secular reasons; for instance, because of an "intolerance" such as that practiced by the French Revolution or—he hinted—by "Communism and Socialism." The essence of the right of a recognized state is its title to freedom, that is, to the exercise of the state's faculties within the given framework of mutual interdependence of states.

It includes, however, the right of expansion and conquest; in this respect Lorimer spoke significantly of "progressive" and "retrogressive" states. War is justified when waged in pursuit of such "freedom"; Lorimer also encouraged intervention. By virtue of the *de facto* principle "treaties can create no more rights than they can create a man": a perplexing statement questioning the validity of treaty obligations, and elaborated by the author merely through the obscure assertion that a treaty for the termination of rights becomes possible only when the underlying factual relations have been changed for a new relation. Lorimer had very little confidence in arbitration; he wondered whether disputes appropriate to arbitration "have not been hitherto disposed of just as surely and economically and far more quickly by diplomacy."

There is no use in going further into Lorimer's paradoxical, backward, and heavily prejudiced teachings, which, it seems, have nowhere been accepted.⁹⁶ However, endowed apparently with a strong personality, Lorimer impressed some noted contemporaries;⁹⁷ and he has maintained a certain renown as an exponent of Scottish thought in the British literature on international law. As a matter of fact, Lorimer's repetition of the orthodox natural-law doctrine brings home the kinship of Scotch Calvinism to scholastic dogma; James I's epigrammatic comment that "Jesuits are nothing but Puritan-Papists"⁹⁸ is well known. On the other hand, the *de facto* principle stems from Scottish-English empiricism—Hume was a Scotsman—and from a nineteenth century inclination to treat matters of the social sciences in terms of physical or natural science.⁹⁹ The two elements of Lorimer's thought do not blend, however. There is irony in the fact that Lorimer called himself a disciple of the Scotch philosophical School of Common Sense, which, he emphasized, never separated philosophy and theology.

Individual projects for universal peace were no longer conspicuous in this period. They were replaced by an organized action of larger groups aimed at mobilizing public opinion against war in order to influence parties and governments.¹⁰⁰ The movement began in 1815 with the formation of a New York Peace Society by the New York merchant David L. Dodge, who, on religious grounds, condemned war unreservedly. The year 1815 witnessed also the formation of two other peace societies in this country. In 1816 a British Society for the

Promotion of Permanent and Universal Peace was founded in London. Paris became the seat of a peace society in 1821, and Geneva in 1830. In 1843 the first International Peace Congress was held in London. The movement, which came to be called pacifism in the twentieth century,¹⁰¹ was particularly strong in England and the United States; its preponderant trend was religious and radical, opposing any military service and any support of military activities or preparations. The political events culminating in the Crimean War engendered a public opinion hostile to pacifism. Later, the Civil War aroused deep dissension among the American pacifists. The last decades of the nineteenth century brought a revitalization of pacifism, mainly through the adoption of pacifist tenets by the growing socialist parties. At the same time its religious and radical postulates gave way to a somewhat more constructive attitude directed particularly at the introduction of compulsory arbitration of international disputes. Nevertheless, actual effects of the pacifist movement on international law were hardly perceptible during the period. The Red Cross and the Geneva Convention were not the achievements of pacifists. Dunant, in his creative period, was apparently not in touch with pacifist groups and ideas. He based his program on the belief that wars probably could not be avoided; in fact, pacifists opposed the grant of the Nobel Prize to him. It has been asserted that to the peace movement goes the credit for a protocol of the Peace Treaty of Paris wherein the plenipotentiaries expressed a wish that nations, before resorting to arms, should have recourse to the good offices of a friendly power, "if circumstances permit," but this would be a meager result, indeed. It was only in the following period that tangible developments traceable to the pacifist movement appeared in international law.

In private international law the nineteenth century gave rise to important new developments, especially to the adoption of the "nationality principle," which was first enunciated by Pasquale Stanislao Mancini in his Turin inaugural lecture on "Nationality as the Basis of the Law of Nations" (1851).¹⁰² After the idea of a nation unified in a state had won shape and realization in the French Revolution, it became a powerful ferment in subsequent revolutionary movements, which strove to overcome political segregation and backward legitimist systems. Nowhere did the idea of a nation embodied in a unified polity exert more fascination and power than in Italy, where the

calamity of territorial dismemberment was greatly aggravated because of the domination of Lombardy and Venice by a foreign power, Austria. From this state of things there evolved a revolutionary political program according to which all Italians were to be united in one state free from foreign domination. Because this great goal could be attained only through the Italian people themselves by crushing the resistance of utterly reactionary governments whose very existence depended on the preservation of political disunity, the Italian movement for unification assumed a distinctly liberal and democratic tendency which, internationally, took on a pronounced cosmopolitan color.

While such trends are also found in other modern revolutions, their transmutation into a legal doctrine was specifically Italian and may be related to a particular Italian propensity, rooted in a great tradition, for juridical formulae. According to Mancini, international law is the law prevailing among nations, that is, among communities politically united by natural and historical factors (territory, race, language, and so forth) and, most important of all, by the consciousness of common nationality. Such nations, he held, are entitled under international law to organize into states and to live independent of, and equal to, other nations. This idea rapidly captured Italian thought; but before long it was found to be defective because of the impossibility of accepting nations rather than states as the subjects of international relations, and because of the extreme difficulty of applying Mancini's vague definition of a nation to the tremendous variety of human groups.

Nevertheless, Mancini's teachings ¹⁰³ scored a great success in a field for which they had not originally been designed; namely, private international law. From the predominance of the nationality principle in international legal relations he drew the conclusion that, in questions of the status of a person (for instance, divorce and marriage cases and questions of inheritance), the law of the nationality rather than of the domicile of the person should govern; also, in other important situations, for instance, the determination of the law applicable to contracts, the nationality of the parties should have a definite weight. When the Italian Civil Code of 1865 was drawn, Mancini, as a member of the Italian cabinet, succeeded in having his theories enacted in the law. Thereafter, in international legal learning, the Mancinian propositions as set out in the Code were widely considered to be the last word of science; and they were to a great extent accepted

by legislatures and courts of numerous European countries and even by the Japanese and Brazilian codes. Although during the next century the trend turned again toward reinstating domicile as the preferable criterion, it might be hard to find another instance of a juridical theory as successful as Mancini's nationality principle. He also was the first to stress the desirability of multipartite treaties on private international law. Efforts by the Italian government along the lines he suggested failed, but the later Hague treaties on private international law are traceable to Mancini's proposals.

The racial notions of Hitler's Germany have very little in common with the Mancinian doctrine. Mancini did not conceive of a nation as a merely racial unit but essentially as a spiritual and moral unit in which the race is only one factor, not indispensable. More important, the Italian conception is far from assuming racial superiority for the Italians or any other people; it is, as has been mentioned, liberal and cosmopolitan, calling for equality of nations. The incorporation of the nationality principle in the Italian Civil Code is illustrative: it imposed upon Italian courts the duty of applying foreign law in numerous lawsuits of foreigners residing or not residing in Italy, regardless of the fact that foreign courts, where the nationality principle was not accepted, would not take a similar liberal attitude toward Italian parties.

Liberal conceptions prevailed also in the famous study of private international law published in 1849 by F. C. von Savigny,¹⁰⁴ distinguished founder and foremost representative of the German historical school of legal science. He stood for equal treatment of foreigners and nationals and, in cases connected with more than one country, for the use of rules guaranteeing the application of identical legal systems, whatever the jurisdiction invoked. His inquiries dealt the deathblow to the scholastic "Statutes" theory of old and, unlike Mancini's tenets, won recognition also in the English-speaking countries.

An assumption common to Mancini and Savigny was that the canons of private international law were to be derived from the law of nations; and it subsequently became dominant in the learning of the European Continent.¹⁰⁵ It receded only in the following period, when more and more the conviction spread, that the rules of private international law, unless defined by treaty, are determined by municipal law only. The earlier notion significantly expressed an exaggerated belief in the potency of international law.

SYSTEMATIC TREATISES; ORGANIZATION OF LEARNING ¹⁰⁶

In the beginning of the period J. L. Klüber's comprehensive tractate *Droit des gens moderne de l'Europe* (1819) won international recognition, particularly in Russia, where a translation was published in 1828, and remained, until 1880 the only systematic treatise on international law available in the vernacular.¹⁰⁷ Klüber, like Martens a German writing in French, was also in substance a follower of Martens. The value of his book, which was not distinguished by original thought, lay in its ample documentation. Characteristically, he represented the law of nations as a part of diplomacy, thereby stressing its positivist character, though he recognized the law of nature as Martens had done.¹⁰⁸

A far greater value must be attributed to the work of the Berlin professor A. W. Heffter, *The European Law of the Present*,¹⁰⁹ which appeared in 1844. It became the most successful systematic treatise of the nineteenth century. The book went through eight editions, two of them posthumous (1881 and 1888). There appeared no fewer than four French editions; the book was further translated into Greek, Hungarian, Polish, Russian, and Spanish. It has frequently been cited by English and American authors. Heffter wrote the treatise in his late forties, when he had already gained great renown as a teacher and writer on civil law and as an appellate judge. It exhibits kinship with the older school of thought by a propensity for applying private-law concepts to international relations. Yet it is a mature work of balanced judgment and of precise and succinct presentation. Dismissing the law of nature without much ado, the book exemplifies the later form of positivism. Nor is there a philosophical view in it except for a few somewhat extrinsic pronouncements of Hegelian parentage. The treatment, which is strictly juridical and limited to international law, evinces a progressive spirit. Thus Heffter, rejecting the earlier hybrid notion of conquest, paved the way for a more humane and fairer conception of the occupant's power over enemy territory by bringing into relief the distinction between real acquisition and military occupation of territory.

A prominent treatise of the end of the period, leading particularly within the civil-law area, likewise originated in Germany: the *Völkerrecht* of the distinguished German liberal von Liszt, professor at the

University of Berlin, widely known as the leading authority of his day on criminal law and criminology. Impressive by thorough scholarship and its noble, truly supranationalist spirit, it went through twelve German editions, the last one posthumous, and was translated into French, Spanish, Polish, and Russian (there have been at least four Russian editions). In the last edition revised by himself (the eleventh), which was published in 1917,¹¹⁰ von Liszt tried judicially to mete out criticism against acts of Allied as well as of German warfare. He turned against "augmenting and inflating the adversary's faults, while hiding or palliating one's own faults . . . a book to teach the law [*Lehrbuch des Rechts*] would fail in its duty by serving a party." At the same time, while emphasizing his "most serious endeavor for scientific objectivity," von Liszt confessed that his endeavor was not everywhere successful because he felt he was too close to events—pronouncements doubly remarkable because ventured in wartime.¹¹¹

France, even more than Germany, devoted herself during this period to the cultivation of the science of international law; but the French contribution is inadequately reflected by systematic treatises. The most conspicuous French work was Pradier-Fodéré's eight volumes, *Droit international public européen et américain* (1885–1906, the last volume posthumous), comprising more than eight thousand pages, though the last part was not completed. Unlike Heffter's book, the work discusses, in addition to the existent law, the law as it ought to be, and it includes lengthy discourses on private international law. Throughout the text copious excerpts from writers, both early and modern, are inserted. However, the author is conversant practically only with sources available in French—a basis much too narrow for his enterprise. Nor did he advance remarkably new views. Despite his formidable effort, his treatise has gained little authority in France or elsewhere.

Italy's representative work of the period, Pasquale Fiore's *Treatise on Public International Law* (three volumes, 1879–1884),¹¹² was more successful; it went into three editions and was translated into French and Spanish. Still its value has been questioned for various reasons. It is too much given to elaborate disquisition on familiar controversies of a highly academic character, and it does not offer adequate factual information. The markedly abstract and diffuse treatment is typical of Italian juridical learning of the nineteenth century and, to a great

extent, of the twentieth century—a residue of the scholastic way of thinking that was so influential in Italian legal science.

Among writers in Spanish, the Argentinian Carlos Calvo, whose name we have already encountered, gained the greatest renown. His *Droit international théorique et pratique*, published in 1868 in Spanish and later in French, became one of the most influential treatises. It reached the fifth and last edition in 1896, when it had grown from the original two to six volumes. It was also translated into Chinese. The work, conceived in the spirit of the continental European school, was by no means remarkable as legal analysis; but it presented systematically a formidable array of valuable source material (European and American) and historical statements, thus evidencing the positivist trend. It filled a gap, inasmuch as it set forth the Latin American point of view. Its authority was greatly augmented by the author's reputation as a statesman. Calvo showed remarkable independence in dissociating himself from the partisans of a particular "American international law."¹¹³

In the common-law countries the authors of textbooks and treatises were generally much less interested in theory than the writers belonging to the civil-law group. On the other hand, they greatly improved positivist methods by the investigation and analysis of treatises and cases. In the latter respect they had a vantage point over the "civil-law" writers. Matters relating to public law are excluded from the jurisdiction of the ordinary law courts to a far greater extent under the civil law than under the common law. Moreover, in civil-law countries, and especially in central Europe, court authority was not buttressed by the old and firm tradition characteristic of Anglo-Saxon political thought. In Germany, for instance, collections of court decisions did not make their appearance until virtually the second quarter of the nineteenth century, and only in its very last decades did decisions of the highest courts begin slowly to find their place in learned juristic treatises.

The first two systematic works of the common-law group on international law were American. In 1826 James Kent, a preeminent American jurist of his day, began the publication of his *Commentaries on American Law*. The first part, which went through fourteen editions, presented in about two hundred pages an admirably systematic survey of the law of nations, based primarily on English and

American material. His discussion of neutral commerce in war proved to be particularly valuable. The work was the elaboration of lectures he had given as a professor at Columbia College, after retiring from the high judicial position of Chancellor of the State of New York.

The other American work in point, Henry Wheaton's *Elements of International Law*, was published in 1836.¹¹⁴ Wheaton served the United States almost two decades as a diplomat, for the greater part as Minister Plenipotentiary in Berlin. Like Grotius, he employed the leisure left by diplomatic obligations for extensive scholarly studies, in which, even more than his contemporary, Austin, he fell under the influence of German legal science with its emphasis on history; and to this fact we owe his volume on the history of the law of nations.¹¹⁵ Although the *Elements of International Law* is juridically no match for Kent's work, personal experience made Wheaton more familiar with the continental material. Emphasis on diplomatic actions and on cases is pronounced in his study, whose virtues were great enough to give it a considerable and long-lasting influence. It has frequently been cited in American court decisions and state papers. No fewer than fifteen American and English editions—twelve of them posthumous, the last in 1944¹¹⁶—have been published. There are, furthermore, translations into French (two), Italian, Spanish (by a Mexican), Japanese, and, under the direction of the Chinese government, into Chinese (1864).

Kent's and Wheaton's works may well be taken as an expression of the early American attitude toward international law, which shows little of the later emphasis upon the national American point of view.

Among the English treatises of the nineteenth century, Sir Robert Phillimore's *Commentaries upon International Law* (four volumes, including private international law, 1854-61) must be mentioned first. The treatise, which went into three editions, is written in the typical common-law fashion. The author, a judge in high position, presents his opinions on the basis of a careful and well documented argument. Statesmanlike, he pays his respects to the law of nature in an introductory chapter, even recognizing its divine character; but he makes no use of it. In fact, he is a typical positivist whose real concern is confined to the actual controversies laid before statesmen, diplomats, and international jurists. He may also be counted in the nationalist school of thought inasmuch as the book deals for the most part with occurrences in the area of English foreign relations. A

rather singular feature is his emphasis upon the right of intervention for the purpose of maintaining the "balance of power." He strongly defends intervention on this ground as well as on some other (even religious) grounds, but entirely condemns interventions based on reasons not approved by him. They are nothing but "acts of violence." "It is some satisfaction to an English writer that England neither directly nor indirectly gave countenance to those acts of violence." As in the case of Pradier-Fodéré, the work is heavily padded with copious quotations; these are taken not from writers but from English and sometimes from American state papers, government speeches, and cases, though the author was conversant also with continental learning. Probably because of its distinctly insular flavor, the treatise has not been translated into any foreign language.

In contrast to Phillimore's somewhat old-fashioned manner, E. W. Hall's *Treatise on International Law* (1880) is written in a highly artistic style. Hall approached his subject pragmatically and with great acumen, relating his argument closely to the rational basis of the rules under consideration. Apparently a person of strong temperament, he was not without bias in his opinions and selection of topics; for instance, expecting little from international arbitration, he allowed this important topic only two or three pages of the seven hundred and sixty-seven in the text of the fourth edition, the last that he himself revised (1895). There are also other gaps, and his documentation is fragmentary. However, the book was and has remained outstanding as a most readable and spirited exposition of the law of nations. In England the reception made four posthumous editions—the last one in 1924—necessary, so that the total was eight. The treatise won renown also in the United States and in the Far East.¹¹⁷

It was again in England that a treatise originated which in a most felicitous way blended continental and Anglo-Saxon conceptions: F. L. Oppenheim's *International Law* (first edition, 1905–1906, and second edition, 1912, followed by several posthumous editions). Oppenheim (1858–1919), who first taught in Germany and Switzerland, moved in 1895 to England, where he later became a professor of international law at the University of Cambridge. His *International Law* was by common consent and, through the efforts of its editor, Professor Lauterpacht, still is the outstanding and most frequently employed systematic treatise on the subject. English in spirit and German in method, it has developed through the succession of its

editions into a truly imposing repository of the learning on international law.

A vastly different picture was exhibited by Russian literature. In Russia, spiritual divergence from the West greatly affected the conception of law. Law (in contradistinction, e.g., to religion) meant less to a Russian than to a Westerner. It is significant that Tolstoy assigned to the law a rather low place in the scale of human values,¹¹⁸ and as late as 1916 the Russian sociologist Kistiakowsky wrote that Russian intelligentsia never had respected law and never had seen any value in it.¹¹⁹ Characteristically enough, the Czarist judges officiated in semimilitary uniforms symbolizing police power, which was the basis of relations between government and subjects more fundamentally than in the West.

With regard to international law, the situation was particularly unfavorable. Russia had not participated in the religious and philosophical movement in which the law of nations originated. Instead, Byzantine tradition prevailed in the Russian views on foreign relations. In the eighteenth century and later there was a gradual approximation to Western ideas, accelerated in the closing decades of Czardom. But, on the whole, learning in matters of international law was on a low level and was remote from the Russian mind. Grotius' *De jure belli ac pacis* was never published in Russian, except for extracts printed in the twentieth century.¹²⁰ Until 1880 Klüber's book was, we know, the only systematic treatise on international law available in Russian, and until about the same time Russian writers had produced only minor studies in the field.¹²¹

The situation changed, however, in 1882 when Fedor Fedorovich (Frederic) de Martens published his two volumes *International Law of Civilized Nations*. De Martens, the son of Lutheran, German-Baltic parents, was converted to orthodoxy and appointed professor of international law at the University of St. Petersburg. He became by far the most prominent Russian writer on international law.¹²² His method follows the civil-law pattern, especially that of the German school, but the spirit is different. Occupying a high position in the Ministry of Foreign Affairs in addition to the chair at the University, he made it his foremost concern to support the Russian cause in his treatise as well as in his numerous other publications. Legal argument served him rather as a means of rendering his pleas for Russian

claims or defenses more impressive or more palatable. A characteristic feature of his fundamental theory consisted in that he represented the bulk of the law of nations (including the law of war) as "administrative" international law, the supreme principle of which was expediency.¹²³ De Martens' political prominence was perhaps a factor in the success of his treatise which went through five editions and was translated into German, French, Spanish, Serbian, Chinese, and Japanese.

Turning finally to the organization of learning, we find again the beginning of the new era to be of marked significance. In 1869 the first periodical primarily dedicated to international law was founded, the *Revue de droit international et de législation comparée*. It was published in Brussels and was international as to editors and collaborators. It held a leading position in the field until the outbreak of World War II. The foundation of the *Revue* was followed in 1873 by the establishment of a learned society, the Institut de droit international, which was convoked in Ghent and administered from Belgium. Mancini and Bluntschli were among its founders, and in the course of time many outstanding scholars were coopted as members. Still the actual achievements of the Institut were not impressive. Belgium's special role in this field was of course connected with her guaranteed neutrality.

In the last decades of the period, and especially in the years immediately preceding World War I, treatises and periodicals multiplied.¹²⁴ This was particularly true of monographs which, during the greater part of the nineteenth century, had been a rare phenomenon in the field of international law.

In the universities the time-honored chairs and courses on the Law of Nature and of Nations disappeared gradually,¹²⁵ the law of nations becoming an independent object of academic study, though sometimes confounded with diplomacy.¹²⁶ The teaching of the subject began to be transferred to the law faculties, whereas in the early tradition, as we have seen, the law of nature and of nations had been assigned to the philosophical faculties. The earlier tradition was maintained in the United States, where international law was thought to be outside the professional objectives of the law schools.¹²⁷

Paralleling the general development, the scientific work on international law shifted more to jurists, though the jurists never won ex-

clusive dominance. Diplomats, high Army and Navy officers, theologians, and other persons not technically trained in the law participated to no small extent in the scientific discussion of problems of international law. One textbook on the subject was written by an American general,¹²⁸ and another by an American admiral.¹²⁹ In the European scene the links of the subject to diplomacy and military affairs account for the strikingly large part played by the nobility in the literature of international law.

CHAPTER VII

From the Treaty of Versailles to World War II

THE PEACE TREATIES AND THEIR SEQUELS

The First World War was ended by the Peace of Versailles with Germany and the later peace treaties of Saint-Germain with Austria, of Neuilly with Bulgaria, and of Trianon with Hungary. They were juristically much more elaborate than any earlier peace treaty. Taking as their prototype the Treaty of Versailles, effective January 10, 1920, we shall briefly describe their main features and consequences relative to international law until the outbreak of World War II (1) in the political and (2) in the nonpolitical field.¹

By far the most important political innovation of the peace treaties with reference to international law was, of course, the League of Nations as established by the Covenant, which formed the introductory part of the treaties. The notion of the League was rooted in Anglo-Saxon ideology.² President Wilson, the foremost builder and fervent protagonist of the League, had early dreamed of a wider union of the United States type and had this in mind when as President he worked unsuccessfully for a Pan-American Pact in connection with the Monroe Doctrine. In England, the idea of a league of nations had been voiced first, it seems, during World War I,³ though with less authority. Religious sentiments of Protestant lineage were a strong factor, at least with Wilson. There is no indication that the framers of the League had in their mind reminiscences of the peace plan of Abbé de Saint-Pierre or other early authors. Wilson himself considered the plan as American in origin. The name chosen was inaccurate inasmuch as the League was one of states rather than of nations, but the choice of the latter term properly linked the League to the law of nations and to the ideals and historical values associated with that conception.

It is difficult to define the type of legal ties among states as created

by the League. The League was not a federal state of the United States or Swiss type—the bond among the members and the power of the League organs were much too tenuous for that. Much less was it a “superstate,” whatever this may mean. On the other hand, the League was not merely an “alliance”—a concept which suggests as its main purpose a military objective. Moreover, the notion of “alliance” is not consonant with a world-wide organization such as was presented by the League. English jurists have likened the League to a corporation, but this view is unacceptable because the corporate structure is typically based on shares, that is, on a financial principle. If, however, a broader concept of corporation is envisaged, the analogy would be meaningless because of its indefiniteness. It seems that the League most resembled a federation of independent states (*Staatenbund*) of the type presented by the American Confederation from 1778 to 1787, or by Germany from 1815 to 1866, with the difference that the objectives of the League were less comprehensive. However this may be, there was never any doubt that the League constituted a juristic person of international law, capable of having international as well as private rights and duties of its own. Switzerland, as the country of the site of the League, readily accepted this view.

For the purpose of the present inquiry it is not necessary to expatiate on the organization of the League. Suffice it to recall that the main organs were the Assembly, which was the annual conference of the members of the League, and the Council, composed at various times of eight to fifteen members and forming a kind of executive committee.

The activities of the League⁴ started early in 1920 upon the ratification of the Treaty of Versailles. From the beginning, it was hampered by the absence of the United States, which was intended to be in a sense its moderating factor. Symptoms of weakness soon appeared,⁵ and they were accentuated toward the end of the first decade of the League's existence. With the disastrous year 1931, marked by the outbreak of the economic world crisis, a rapid decline began. The first major defeat of the League resulted from Japan's invasion of Manchuria in 1931. When the League finally took a stand duly protecting China, at least in words, Japan in 1933 gave notice of her withdrawal from the League, retaining, however, her “mandates” in the North Pacific. By a nice piece of legalistic irony, Japan continued to send in her innocuous “annual reports,” politely refusing their further

discussion. The League proved almost powerless even toward little Paraguay in her war with Bolivia over the possession of the Chaco. When the Assembly of the League in 1934 finally arrived at a unanimous decision against Paraguay, the latter, openly defying the League, declared her withdrawal. Only under strong pressure by the United States, Brazil (which had left the League in 1928), and other American states, was peace attained as late as 1938. The fatal blow to the prestige of the League was its retreat before Fascist Italy after Mussolini's invasion and conquest of Abyssinia (1936). As an instrument of political action, the League was terminated by the outbreak of World War II, except that in December, 1939, it expelled Soviet Russia because of her aggression against Finland.⁶ Russia's hostility, which resulted from this action, prevented a reconstruction of the League. Nevertheless, the ideological tie of the League with the United Nations of 1945 is obvious; also, the Charter of the United Nations embodies numerous features of the Covenant of the League.

The political functions of the League were dual. On the one hand it was entrusted with specific duties relative to the execution of the peace treaties; on the other hand, the League was dedicated—in the words of the Covenant—to the achievement “of international peace and security.” This meant in the first place the maintenance of the *status quo* as set up by the peace treaties; but broader policies looking toward the establishment of a peaceful atmosphere under the rule of international law were at the same time envisaged and emphasized in the Covenant.

In connection with the execution of the peace treaties, there were assigned to the League the trusteeship of the Saar Basin⁷ and the preparation and supervision of the final plebiscite there in Upper Silesia;⁸ the organization and supervision of the regime for the Free City of Danzig; the exercise of certain functions in the matter of the “mandates”; and the protection of national minorities. The latter task was conferred upon the League by the peace treaties and various other international arrangements.⁹ Minorities were thereby accorded far-reaching political, religious, educational, and linguistic rights. While in this connection the League was heavily criticized as not having done all that was within its power,¹⁰ its other administrative functions were on the whole discharged without major disturbances or controversies.

The League was unsuccessful, however, in its struggle for broader

political objectives. Its efforts toward the limitation of armaments, as intended by the Covenant, failed entirely ¹¹—a failure which, in 1933, gave the Hitler government a pretext for its ominous withdrawal from the League.

Nevertheless, we may credit the League spiritually and politically with the Locarno Pact of 1925, in which France, Germany, and Belgium pledged themselves to a mutual policy of nonaggression, while at the same time the inviolability of their common frontiers was guaranteed by England and Italy. The Pact embodied arbitration agreements between Germany on the one hand and France, Poland, Belgium, and Czechoslovakia on the other, and it provided machinery also for the peaceful settlement of nonjusticiable disputes. The Pact was followed by Germany's entry into the League. Still, the improvement in the political situation lasted only a few years. In 1936 the Pact was terminated by Germany.

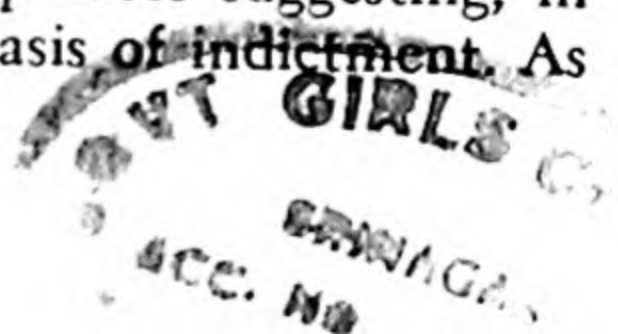
Another dramatic effort toward the achievement of international peace was undertaken in 1928 by the Pact of Paris, better known as the Kellogg Pact, for the Renunciation of War. The French Foreign Minister, Briand, and the American Secretary of State, Kellogg, were its outstanding sponsors. Unlike the Locarno Pact, the Kellogg Pact did not refer to the obligations under the League Covenant; but spiritually it was connected with the work of the League. The signatory powers renounced war as an instrument of national policy in their relations with each other, and they pledged themselves to seek the solution of their controversies by pacific means only. It was a triumph of American pacifism. Many people believed that the Pact inaugurated a new era of international law, but such belief was soon to fade. In no way did the Pact impede its signatories in the pursuance of aggressive and bellicose plans. When Japan, one of the signatories, invaded Manchuria in 1931, Secretary of State Stimson declared the United States could not admit the legality of any situation or agreement brought about by means violative of the Kellogg Pact ("Stimson Doctrine of Nonrecognition"); and this was followed by a similar resolution by the League of Nations.¹² At the time of Pearl Harbor, Japan was still bound by the Kellogg Pact.

Next to the League, historically the most interesting politico-legal feature of the peace treaties was probably the institution of the mandates,¹³ under which territories ceded by the defeated powers were turned over to various Allied powers. The mandates, a novel

device in international law, were a substitute for annexation, which would have been the customary solution; but the latter was, on principle, rejected by President Wilson. "Mandate," a term taken from Roman law, suggests a delegation of power by the League, holder of supreme authority, to the "mandatory" state. In reality, the mandate gave such a state full political dominance; it differed from annexation only by an obligation to render annual reports and by a number of duties or prohibitions, the observance of which was practically left to the discretion of the mandatory. An instance in point was Japan which, contrary to the terms of her mandates, erected in the mandated territories military and naval bases that were adroitly concealed from the eyes of foreign visitors. By no means were the mandates a fortunate creation.

Other important aspects of legal history are presented by the provisions of the Treaty of Versailles regarding the responsibility for the war and for actions of warfare.¹⁴ According to Article 231 of the Treaty, the victorious governments affirmed, and Germany accepted, the responsibility of Germany and her allies for causing all the loss and damage to which the victorious powers and their nationals "had been subjected as a consequence of the war imposed on them by the aggression of Germany and her allies." This phrase was tantamount to a declaration and confession that Germany was primarily guilty of having started the war; in other words, that her war was "unjust." The fact that the victorious powers acted as judges on this question was consonant with the earlier doctrine, though there was in it no basis for imposing upon the vanquished a formal confession of guilt. With respect to Germany, the question of guilt was at least clouded by the manifest fact of Austria's first aggression; and the whole concatenation of circumstances raised problems pertaining more to the province of the historian than to that of the jurist. Whatever the merits of the question, Article 231 became not only the focus of German denunciation of the Treaty of Versailles but the rallying center for the sinister forces that precipitated World War II.

In close connection with the general idea underlying Article 231, the Treaty provided for the extradition to the Allies of the former German Emperor, who was to be tried, "according to the highest motives of international policy," "for a supreme offense against international morality and the sanctity of treaties," phrases suggesting, in the first place, a political rather than a legal basis of indictment. As



is well known, the extradition of the Kaiser did not take place because the government of the Netherlands, where he had fled, insisted on its right to grant asylum to political refugees—an attitude in which the victorious powers acquiesced.

The Treaty provided also for the trial before courts of the victorious powers of Germans who had committed crimes violative of the law and customs of war, or crimes against nationals of the victorious powers. These provisions, especially those concerning war crimes, remained within the boundaries of international law. Actually, the Allies left these trials to the German courts, with very unsatisfactory results. However, this part of the Treaty created a precedent¹⁵ which was to exhibit its potency after World War II. Still, one must not overlook the fact that Hitler and his associates were not for a moment deterred by the existence of the precedent or by the sternest warnings of the Allied Powers from committing the most gruesome war crimes in history.

In the nonpolitical field, the effects of the peace treaties appeared in manifold activities of the League¹⁶ and of other institutions created by the treaties. We are concerned only with activities related to international law.

In this respect, the efforts of the League took the form of multipartite and open treaties on a large scale; but their success was disappointingly slight.¹⁷ Sometimes the draft agreements of the League did not lead to signatures; or they were signed but not ratified at all, or not by the required number of states; if effective, they often remained insignificant because of the small number of major signatories, or because of unsatisfactory implementation on the part of the national legislatures or administrations, or for other reasons.

The economic policies of the League were guided by the philosophy of economic liberalism of the English type, sponsoring measures conducive to freedom of commerce and to economic cooperation. In doing so the League struggled heavily against the tide. Its most useful work in the legal-economic area was probably the Geneva uniform laws on bills of exchange and on checks (1930),¹⁸ which were ratified by a great number of important states, though not by the common-law countries. Still, these laws, which established some measure of uniformity in a commercially vital matter over a wide area, were merely a slightly revised version of conventions which had been

signed shortly before the outbreak of World War I, as a result of conferences held at The Hague from 1910 to 1912.

Among the original contributions of the League were the two Geneva treaties on commercial arbitration of 1923 and 1927 which (1) made commercial and, to a certain extent, noncommercial arbitration clauses binding between private parties of different countries, and (2) rendered enforceable awards issued on the basis of such clauses. While ratifications were satisfactory, application was difficult.¹⁹ A worth-while objective was furthermore pursued by a convention of 1923 for the simplification of customs formalities (commercial policy was not involved); but, with respect to its more important points, the convention did no more than proclaim principles to be made effective by the national legislators at their discretion. The practical effect was of little account, except that provisions of the convention were sometimes incorporated into bilateral commercial treaties. Another Geneva convention of an economic character provided for the suppression of counterfeiting of currency (1929). Though it, too, was ratified by a considerable number of the greater states, no practical application is known. Better results were reached in the international law of communications, especially through the multipartite and open convention of 1923 on the international regime of railways, which was aimed at establishing uniformity in technical matters. International air traffic was regulated on a large scale virtually outside the League through the International Commission for Air Navigation, created by the multipartite and open Convention for the Regulation of Aerial Navigation concluded in 1919 at Paris. The Commission was to work under the direction of the League, but it remained practically independent.

In a number of instances the League procured financial assistance for distressed countries; yet in this respect the notion of international cooperation was overshadowed by political considerations in the interest of the *status quo*.²⁰ The foremost example was the loan in 1922 to Austria under the auspices of the League and under the guarantee of Great Britain, France, Italy, and other League states. The loan was notable from a legal point of view because Austria undertook not to "alienate her independence," which the guarantor powers on their part pledged themselves to respect. The "independence" clause became the object of a highly controversial opinion of the Permanent Court of International Justice.²¹

The League's endeavor in international legislation and administration extended, furthermore, to a great many humanitarian undertakings partly started in the preceding period: the fight against epidemics; suppression of the opium and slave traffic; education and child welfare; and aid to refugees driven from their countries by the war. In the aid to refugees, a remarkable achievement was attained under the inspiring leadership of the Norwegian explorer, Fridtjof Nansen, as High Commissioner of the League. To him must be attributed the introduction of a new international document, the "Nansen passport," which served as official identification certificate for a refugee unable to obtain a passport from his or her own country because of loss of citizenship or some other reason. Among the treaties concluded under the auspices of the League, the Convention of 1923 for the suppression of the circulation of and traffic in obscene publications, and the revisions of some of the older conventions (on opium, slavery, and traffic in women and children), were the most important.

International law was the immediate object of the First (and only) Conference on the Progressive Codification of International Law held under the auspices of the League in 1930 at The Hague; but the results of the conference were most unsatisfactory.²²

In striking contrast to the consummated efforts, the amount of preparatory and research work done by the League was formidable indeed; ²³ as early as 1935 the number of separate documents it published was estimated at more than four thousand.²⁴ They contain much valuable information for future international legislation and historical inquiry. At the same time the mass of publications reflects the inherent difficulties and the many frictions that hampered the pursuits of the League.

Next to the League itself, the International Labor Organization ²⁵ played an important role in the nonpolitical field. While linked to the League, it was on the whole an independent institution, and some of whose members were not associated with the League—for instance, the United States, a member from 1934. The Organization was composed of a General Conference of Representatives, convened at least once a year, ordinarily at Geneva prior to World War II, and an International Labor Office, also seated at Geneva. Each government nominated four delegates, among them a representative of the employers and a representative of the workers. Similarly, of the thirty-

two members of the board ("Governing Body") sixteen were chosen by the employer and worker delegates—eight by each group; sixteen were government representatives. In the Conference and the Governing Body the employers and the workers were supposed to vote independently of their governments. This adoption of democratic principles was a remarkable novelty in international law, which had previously known only of government delegates casting a unified vote. The new feature was the main reason for the inability of the Organization to collaborate with totalitarian regimes. Soviet Russia belonged to the Organization during its membership in the League (1934–1939), but practically limited its delegates to the role of observers.²⁶ The chief contribution of the Organization to international law consisted of "draft conventions." If these were carried in the Conference by a two-thirds majority the member states were required to submit them within a certain period to the competent national authorities for a decision on ratification. Up to 1929, twenty-seven conventions were adopted, which received on the average a little more than twenty ratifications each. In 1927 the curve of ratifications began to decline; after 1929 ratifications were only sporadic.²⁷ Among the ratifying states, the small and smallest countries were conspicuous. Besides, ratification here, as elsewhere, did not invariably mean execution. Even if one takes into account that, conversely, the approval of a competent national authority without ratification might have had the desired effect, the impression remains that in terms of international law the work of the Organization was not effective. This is not meant to deny the Organization's usefulness. In a way, the Organization reflects, in terms of international law, the ascending influence of the working class. Manifest achievements in research, information, advice, propaganda for better working conditions, political rapprochement, and so forth are outside the scope of the present inquiry.²⁸

The Organization has survived the collapse of the League. Its Office moved to Montreal in 1940 but returned to Geneva later. Its work continues.

Another original creation for which the peace treaties were responsible was the clearing procedure for prewar debts payable between former enemies; for example, between English creditors and German debtors, or vice versa.²⁹ Debtors falling under this provision were prohibited from making direct payments to their creditors, who, in turn, were prohibited from accepting such payments. Instead, the settle-

ment was to be carried out through clearing offices established by every signatory state (unless a victorious state wished to refrain from the procedure). Each debtor had to make payment in his national currency to his national office, and each creditor would receive payment in his national currency from his office, while the offices would credit and debit each other correspondingly and settle the accounts by set-off and payment (or equivalent disposition) of the balances. The procedure served to retard renewed business collaboration between former enemies. At the same time, the treaty provided for a "revaluation" of the greatly depreciated German mark with the result that the debtor office had to pay mark debts in English pounds (or, in the case of another opposing office, in the latter's money) at the much higher prewar ratio under the guarantee of the government. The outcome was, in the case of Germany, a considerable increment in the reparation debt, but the knot was cut through Germany's insolvency. The whole machinery, anticipating the later conventions on exchange control, was probably the most complicated and irritating ever set up in international legal relations.

Indirectly, the Treaty of Versailles gave rise to the Bank for International Settlements at Basle.³⁰ Directly, the Bank owed its existence to the Hague Conventions of 1930 regarding the settlement of the reparations owed by Germany under the Treaty of Versailles. The Bank had the same international features as the State Bank of Morocco; in addition, its functions were international in the double sense that it was entrusted with the service of the reparations and was authorized to promote international cooperation in financial and commercial matters. In this second function the Bank achieved very little. It was a far cry from the later International Bank for Reconstruction and Development. A curious event in the life of the Basle Bank aroused much comment.³¹ Through the annexation of Czechoslovakia, Hitler Germany, already in possession of the Austrian shares, had in addition acquired the Czechoslovakian shares and domination over the Czechoslovakian National Bank. The latter had a gold deposit with the Bank for International Settlements, which in turn held the gold in a deposit with the Bank of England. When, upon the order of the Czechoslovakian bank—that is, actually on German order—the Bank for International Settlements transferred the gold to the Reichsbank a few months before the outbreak of the war, the Chamberlain cabinet, over strong parliamentary opposition, allowed

the gold to be delivered to Hitler, although this was by no means a clear case for the German government.

INTERNATIONAL-LAW DEVELOPMENTS NOT CONNECTED WITH THE PEACE TREATIES

In the interval between the World Wars, international state practice underwent various changes in the political as well as in the economic sphere outside the orbit of the peace treaties.

Among the political events, the emergence of the Soviet Union and its impact on international law require separate discussion (*infra*, page 285). The other political developments of the period are less important. From a juridical point of view the accomplishments of the International Union of American Republics³² offer a particular interest. Founded, as was seen, in 1890, it belongs in historical perspective more to this period. It operated through government conferences and a permanent secretariat in Washington, the Pan-American Union—a title somewhat inexact because of the absence of Canada. The International Union was dedicated to the promotion of inter-American relations in the political, economic, and cultural spheres. Subsequent to the creation of the League of Nations, the Union became a kind of American counterpart or supplement of this. Beginning with the Sixth inter-American Conference at Havana in 1928, it undertook, like the League, the large-scale preparation of multipartite treaties.³³ Among them was the Antiwar Pact of Non-aggression and Conciliation (sometimes called the Saavedra Lamas Treaty, in honor of the Argentine Foreign Minister), entered into on the initiative of Argentina at Rio de Janeiro in 1933. The treaty, supplementing the Kellogg Pact and elaborated by later agreements, inaugurated an inter-American policy of solidarity in the case of aggression against American states. That policy proved effective during World War II in the diplomatic and economic fight against the Axis.³⁴

The objects of the other inter-American conventions were most diversified. The lengthy Convention on Private International Law (1928) prepared by the Cuban jurist Bustamante (hence, "Code Bustamante") received fifteen ratifications, among which, however, the Brazilian was the only important one. There is little evidence of its application in practice. Here, as in other cases, ratification seems

to have been widely a matter of courtesy or the result of a desire to adorn statute books with impressive-looking international documents. A Convention on Rights and Duties of States in the Event of Civil Strife (1928) was helpful in precluding foreign assistance to local revolts. The 1933 Convention on the Rights and Duties of States is interesting as recognizing the doctrine of fundamental state rights. Still other treaties dealt with political asylum, status of aliens, extradition, and aviation,³⁵ but they all remained insignificant because of the paucity of ratifications and for other reasons. All in all, the results of the Union's treaty-making efforts were no more encouraging than those of the League.

Regional developments of a political character appeared furthermore within the British Empire and in the Near East. In the British Empire, the self-governing Dominions, Australia, Canada, the Irish Free State, New Zealand, and South Africa, rose well-nigh to independence, bringing to a climax earlier developments. The Statute of Westminster (1931) confirmed the full autonomous statehood of the Dominions. Since then the Dominions have been full-fledged participants of international law. A parallel evolution was the transformation of Iraq (1932) from a mandate into an independent state. The advancement of the Near East territories toward independence was further indicated by the multilateral Treaty of Montreux (1936) which abolished the Egyptian Mixed Tribunals by 1949. The centrifugal trend within the orbit of the democratic powers, evidenced also by the promise of independence by the United States to the Philippines (1934), contrasted strikingly with the aggrandizing policies of the totalitarian powers exemplified in the annexation of Austria by Hitler and of Abyssinia by Mussolini.

Nonpolitical international developments unconnected with the peace treaties loom larger in the interval between the World Wars. This is particularly true of commercial³⁶ and monetary relations. The pattern of treaties of commerce as formed in the late nineteenth century persisted on the whole during the twentieth, but symptoms of crisis had appeared even before World War I. Technological progress and greatly improved communications, by intensifying competition among the nations, brought into relief the gratuitous advantages which, under the most-favored-nation clause, accrued to a most-favored nation as a result of any tariff concession made by the obli-

gated nation to a third state. Various devices were early invented to prevent this consequence. A certain renown was won by a clause in the German-Swiss Commercial Treaty of 1904 in which Germany conceded to Switzerland a reduced tariff for female calves "reared at a spot 300 meters above sea level" with "at least one month of grazing at a spot at least 800 meters above sea level." Such calves the Netherlands and other most-favored nations certainly could not produce. The example is extreme but by no means isolated. Generally speaking, undesired effects of the most-favored-nation clause were often eliminated by an appropriate refinement of tariff classification.³⁷ Moreover, exclusive reciprocal tariff preferences were created on a large scale in 1932 by the Ottawa Conference among England and the Dominions, weakening thereby the position of "most-favored" nations.³⁸

The familiar system of commercial treaties was further disturbed by the emergence of totalitarian regimes. Where the full power of such a regime was put behind export and import transactions—by way of state monopolies, by subsidies, or otherwise—the free interplay of competitive forces, basis of that system, was destroyed. Especially in Soviet practice, the pattern of commercial treaties underwent great changes. "International bills of rights" on the basis of the national-treatment clause were out of the question, while the position of the monopolistic commercial agencies to be established by the Soviets in the cocontracting country had to be defined by the treaty.

But these changes in the legal structure of international economic relations were slight if compared with the effects of the upheaval caused in 1931 by the outbreak of the world monetary crisis. Originating in Austria, sore spot of the European political-economic structure, the crisis spread like wildfire, first to Germany, then to England, and finally it ravaged the whole world. The gold standard, precious product of a long and progressive development, was shattered with lightning speed, yielding to the circulation of unredeemable paper money. International stabilizing agreements, a novelty in international law,³⁹ were employed to stem the tide but were short-lived. The "Gold Bloc" was formed in 1933 among the countries of the former Latin Monetary Union, in conjunction with Poland and the Netherlands, in order to uphold the free operation of the gold standard at the then existing lowered parities of their currencies; but in 1934 Poland, Italy, and Belgium, too weak for such an undertaking, left the Bloc, which

definitely broke down in 1936. In 1934, Great Britain, some Dominions, and the Scandinavian countries formed the "Sterling Bloc," the aim of which was to align the international values of their currencies on the basis of the value of the pound, to be buttressed by the stabilization fund of the English Treasury. Finally, in 1936, the so-called Tripartite Agreement was concluded between the United States, Great Britain, and France, heralding a common monetary policy and making American gold available under certain terms to the contracting states. Belgium, the Netherlands, and Switzerland joined the agreement in the same year. Under the impact of World War II, the Tripartite Agreement lost its significance; the Sterling Bloc persisted but was weakened. All three of the stabilizing arrangements were more or less informal and easily dissolvable ("gentlemen's agreements"); the steadily and perilously changing political situation no longer admitted of long-term obligations, at least in the monetary field.

Where countries, through international understandings or otherwise, were unable to secure gold or foreign currency necessary for the payment of their debts to other countries, governments with ever increasing rigidity resorted to exchange control, that is, to government control over gold and foreign currency as well as over payments to or from foreign countries. Under a fully developed system of exchange control, all payments to foreign creditors, and even the acceptance of payments from abroad, required a government license. This system was bound to entail complete economic and financial seclusion, such as no country can afford in the long run; it therefore called for supplementary international agreements aimed at procuring foreign commodities under terms reducing the transfer of gold or currency to the other country to a minimum. These "transfer-saving" agreements were sometimes designed for an exchange of equivalent quantities of certain products of the two countries concerned (barter agreements). Others (clearing agreements) established a complicated clearing machinery of the type found in the peace treaties, so that the reciprocal debts (for instance, debts of a Swiss resident to a German resident, or vice versa) were settled as far as possible through a set-off between the two national clearing offices. These devices were in large-scale use on the European Continent.

The impact of the monetary developments upon commercial relations was considerable. In order to cut down payments to foreign

countries, import quotas—that is, maximal quantities allowed for imports—were introduced, together with other restrictive measures, such as the requirement of licenses for imports and exports.⁴⁰ Commercial agreements tended to become strictly “bilateral” inasmuch as they contemplated a balanced exchange of goods exclusively between two countries through governmental regulation. The most-favored-nation clause, weakened anyhow, lost in frequency, and the typical period of commercial treaties—five years—was reduced to one year or less.⁴¹ In several important aspects, therefore, the value of commercial treaties was diminished. The League’s attempts to stem the flood remained futile.

In this turmoil, the United States, as the foremost sponsor of an economic philosophy based on private enterprise, gave its support to the hitherto accepted ways of world trade. Though clinging to high tariffs, the United States in 1925 made a concession to economic liberalism by turning from the conditional to the unconditional type of the most-favored-nation clause. In 1934, following the stabilization of the dollar, the country embarked under the New Deal on a policy of reciprocal trade agreements based on tariff reduction and most-favored-nation clauses.⁴² American legislation even provided that all countries—not only the most-favored ones—should benefit from agreed reductions of tariffs (“generalization clause”). By 1939 about twenty agreements of that type were concluded;⁴³ but with the growing crisis it proved necessary to provide for novel “escape clauses” permitting one-sided withdrawal from the agreement on the contingency of the introduction of quotas, or in case of wide fluctuations of the rate of exchange; and vague provisions tried to meet the establishment of new monopolies and the initiation of new disruptive policies. These arrangements further diminished the legal strength of commercial agreements.

While the legal structure of international commerce, as evolved in the nineteenth century, was shaken to its foundations, there emerged at the same time a new type of compact for the international exchange of goods, “commodity-control agreements”⁴⁴ which were aimed at a regulation—world-wide or over vast areas—of production and distribution of certain basic raw materials. These multipartite agreements pursued objectives broader than did the Sugar Convention of 1902 which had limited its operation mainly to the abolition of export bounties. The new compacts were called forth by the chaotic market

conditions which had arisen during the monetary crisis and even before. Primarily, they were designed in the interest of the producers, though ordinarily the interest of the consumers was equally emphasized. The most elaborate and stringent among them was the 1937 Agreement Regarding the Regulation of Production and Marketing of Sugar, which was a full-fledged international convention; but for the most part the agreements were in the nature of administrative arrangements that did not require ratification and were therefore more easily amendable. The chief examples of the latter are the 1934 Agreement to Regulate Production and Export of Rubber and the 1937 Agreement on the International Tin Control Scheme. The chief producing or export countries, and sometimes consuming countries, were the participants. The United States joined the Sugar but not the Rubber Agreement. Regulation was based principally on export quotas in order to counteract overproduction; in the case of the Sugar Agreement, American import quotas were likewise set because of the crucial importance of the American market. In every agreement an elaborate organization was set up which centered in a governing body (International Sugar Council, International Rubber Regulation Committee, International Tin Committee—all at London). These bodies were composed of delegates of the contracting states, with the voting power graded according to the exporting or importing capacity of the country—an interesting contribution by state practice to the issue of equality of states. World War II disrupted the operation of the agreements.⁴⁵

New efforts toward limitation of armaments resulted in some naval agreements, all of passing significance.⁴⁶ Particularly, on the initiative of the United States, a Treaty for the Limitation of Naval Armaments was concluded in 1922 at Washington by France, Great Britain, Italy, Japan, and the United States. It obligated the powers to the "scraping" of certain warships, in addition to limitations on the number of warships and the caliber of guns. The treaty was denounced by Japan in December, 1934, to be terminated at the end of 1936.

Progress in the humanization of warfare was accomplished independently of the work of the League by two momentous multilateral conventions signed at Geneva in 1929: one amending the Red Cross Convention, and the other regulating the Treatment of Prisoners of War, thereby replacing a chapter of the Hague Convention

concerning the Laws and Customs of War on Land. Both conventions brought about considerable progress. The first extended the Red Cross Convention to aircraft used as a means of medical transport. The second conferred upon the neutral powers entrusted with the protection of prisoners of war the legal status necessary for efficient execution of their task—a great improvement; it also forbade the taking of reprisals against prisoners. Rejecting the general-participation clause, the new treaties provided that they were binding upon those belligerents who were parties thereto. Ratifications were numerous and included, in the case of the Red Cross Convention, practically all important countries.⁴⁷ The new Convention on Prisoners of War was not adopted by Soviet Russia or Japan. A Soviet project on the same subject significantly did not provide for supervision by a neutral power;⁴⁸ and as to the Japanese, their inhuman contempt for prisoners of war, Japanese or enemy, was apparently one of their motives for not ratifying the convention.

In the humanization of maritime warfare, the experiences of World War I led in 1936 to a convention limiting submarine warfare against merchantmen;⁴⁹ but early in World War II the convention was disregarded by Germany, one of its signatories, and thereupon abandoned by the other powers.

The concussion of the neutrality concept which had begun in World War I was felt throughout the period.⁵⁰ The League Covenant itself declared that a member resorting to war contrary to the Covenant should be deemed to have committed an act of war against all other members, and that the latter should discontinue trade and financial relations with him; collective military sanction, too, could be authorized. This rule was interpreted by some as the end of neutrality, whereas, in the opinion of others,⁵¹ the effect was only that participation in sanctions under the Covenant would not entirely obliterate the neutral position of the participant.

As a matter of fact, when in 1935 the members of the League found Italy guilty of having violated the Covenant through her attack upon Abyssinia, and in part resorted to economic sanctions against Italy, they still considered themselves as neutrals. This was clearly a restricted neutrality.⁵² A similar type of neutrality, based on collective policies, was envisaged by the inter-American treaties of 1933 and 1936⁵³ and carried out during World War II by the American republics. Soon after the outbreak of the war they established a zone

of security around the American continent not to be entered by the belligerents (Declaration of Panama, 1939). Thus, the "war zones" of World War I were paralleled by something like a "nonwar zone." While this measure did not contradict the fundamental rule of neutrality as one of impartiality, Hitler's declaration of war against the United States led in 1942 to a well organized and far-flung economic cooperation of the American republics against the Axis Powers (Resolution of Rio de Janeiro, 1942), mainly on the basis of a declaration adopted in 1940 at Havana, according to which any aggression by a non-American state against an American state should be considered as an aggression against all of the signatory American states.

The Axis Powers had not been members to the agreement, and so one would overstrain the term "neutrality" by applying it to the cooperation of the Latin American republics with the United States in World War II. Rather should their attitude be likened to "non-belligerency" such as declared by Italy at the beginning of the war. Whatever the terminology, there seems to develop among the states a new condition in war, which is characterized by support to one belligerent party without direct participation in warfare.

The trend, however, was not invariably along this line, at least not before the outbreak of World War II; quite the contrary, the experience of World War I induced a number of states to strive for unrestricted neutrality in the event of a new war. On this score the United States was leading by her neutrality legislation, especially by her Neutrality Act of 1937, according to which goods for belligerents were to be transported exclusively on foreign ships and paid for before leaving this country. This measure, again impartial toward all of the future belligerents, was a futile attempt to avoid involvements similar to those which had drawn the country into World War I.

INTERNATIONAL DISPUTES AND JUDICIAL ORGANIZATIONS

In the judicial administration of international law, the interwar period was definitely one of progress, in which the founding of the Permanent Court of International Justice was the outstanding event.⁵⁴ Created under a provision of the Covenant of the League, the Court came to life in 1921 through the signature and ratification by the majority of the League members of the "Statute" of the Court, which had been drafted under the auspices of the League by a committee

of outstanding experts on international law. In the title of the Court, in which the omission of the term "arbitral" was noteworthy, the word "Justice" indicated the exclusive role of international law; "arbitrators" often resort to considerations of a purely equitable character.

The Court was established at The Hague in the stately Peace Palace donated by Andrew Carnegie. It consisted of eleven (later, fifteen) judges appointed for nine years. In contrast to the Permanent Court of Arbitration, the parties to a litigation had no influence upon the composition of the bench except in a case where the Court included on the bench a judge of the nationality of one of the parties—in this situation, the other party was allowed to choose one of its nationals (or another person) to sit as judge.

According to its Statute, the Court had to apply: (1) international conventions recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; (4) subsidiarily, judicial decisions and the teachings of the most highly qualified publicists of the various nations. This fourfold direction—which has been adopted by the Charter of the United Nations for the new "International Court of Justice"—enabled the Court to bridge the yawning gaps of the law of nations in each particular case, that is, for practical purposes, to set new rules. Custom, as we have seen, is for the most part vague and controversial. However, the "general principles of law recognized by civilized nations" constitute a vast store of applicable norms. The elevation of these principles, which spring from the national legal systems, to the rank of an international source, is of unusual interest historically: it means the revival of the *jus gentium* of old as set forth by the Romans and refined by Suárez, except that the two elements of *jus gentium*—viz., international and universal law (which Suárez separated)—are now reassociated in a new order of thought. The reference to the teachings of "publicists" brings into relief the cocreative function of science. This feature stems ultimately from civil-law usage, but is in accord with the particular practice of the Anglo-Saxon countries in matters of international law.⁵⁵

Among the countries standing aloof from the Permanent Court the United States and Soviet Russia were conspicuous. After protracted negotiations an official protocol for the accession of the United States was drafted in 1929, stipulating heavy reservations in favor of this country. The reservations were approved by the members of the

Court organization, but when finally in 1935 the draft was voted on in the United States Senate, it was defeated because it did not receive the necessary two-thirds majority, fifty-two senators voting *pro* and thirty-six *contra*. The defeat was all the more striking as the accession would have laid a minimum of legal obligations upon the United States. This followed not only from the reservations agreed upon, but even more from the fact that under the Statute of the Court no state was bound to submit to the jurisdiction of the Court in any particular case.

In general, the latter limitation was a fundamental weakness in the Court's structure. But at least a remedy was provided under the Statute by way of an "optional" clause. By signing that clause, a government undertook to accept the Court's compulsory jurisdiction in disputes with every other government making the same declaration; namely, in legal disputes concerning (a) a question of international law such as the interpretation of a treaty, (b) the existence of a fact which would constitute a breach of an international obligation, and (c) the reparation to be made for such a breach. In a long drawn-out process, the "optional" clause was ostensibly accepted by forty-five governments, but for the most part with time limitations resulting in a gradual decrease of the participants. Besides, the declarations of acceptance were generally conditional, a particularly incisive condition (set, e.g., by Great Britain) being that the dispute must not "fall exclusively within the jurisdiction of the accepting state."

Eleven cases were actually brought to the Court under the optional clause but only in four cases (two of them were really one) did the parties agree on the point of jurisdiction.⁵⁶ In the seven other cases lack of jurisdiction was asserted or indicated by the defendant. Twice the Court declined to take jurisdiction; in a third case it assumed jurisdiction but only in part. In the remaining four cases, for one reason or another, no decision on jurisdiction was reached. This record of the optional clause is certainly not encouraging. The most important case decided under the optional clause was a Norwegian-Danish controversy on sovereignty over certain parts of eastern Greenland. The judgment, which contributed important views to the doctrine of acquisition of sovereignty through occupation, went to Denmark.

Under the auspices of the League, the General Act for the Pacific Settlement of International Disputes was concluded in 1928. This was an open multipartite convention by which the contracting powers, in

the absence of submission to another international tribunal, accepted the compulsory jurisdiction of the Permanent Court in regard to future conflicts with each other involving their respective rights ("justiciable" conflicts). For the settlement of other ("nonjusticiable," that is, purely political) conflicts, a special arbitral procedure was provided. The Act was adopted by more than twenty states, including Great Britain and France, but it was never applied.

Jurisdiction was, however, conferred upon the Permanent Court exclusively or alternatively with other tribunals, by hundreds of international agreements,⁵⁷ for instance by general arbitration treaties—they are the largest group, numbering about one hundred seventy-five—by commercial treaties, by conventions drafted within the International Labor Organization, by compacts on communication and transit, and in some respects by the peace treaties. Seventeen cases of this type led to judgments, a few requiring several judgments. The first case, and at the same time the first instance of any exercise of compulsory jurisdiction, was the *Wimbledon* case, in which France and other Allied Powers in 1921 sought damages from Germany for her refusal to allow passage through the Kiel Canal of the steamer *Wimbledon* chartered by a French company and carrying ammunition for Poland, then at war with Russia. The Court assumed jurisdiction under the Treaty of Versailles, giving judgment against Germany, who had based her defense upon her position as a neutral. Germany herself, under the Treaty of Versailles and an ancillary German-Polish Treaty of 1922, brought several suits in the Permanent Court on the ground that Poland had violated Germany's treaty rights in Upper Silesia—which, under the treaties, had been ceded to Poland. The outcome of the cases, in which the Court again assumed compulsory jurisdiction, was favorable to Germany.

Judgments of the Permanent Court based on *ad hoc* submission agreements rather than on compulsory jurisdiction were rare, but they included some famous international disputes. In the *Lotus* case (1927) Turkey had instituted criminal proceedings against a French officer of the French steamer *Lotus*, which, allegedly through negligence, had collided with a Turkish collier on the high seas and had sunk it, causing the death of several Turkish nationals. France brought suit against Turkey, alleging that Turkish criminal proceedings against a Frenchman for an act committed on the high seas violated international law, but the Court held for Turkey, the president casting the

deciding vote as the Court was divided six to six. In 1932 France also lost her suit in the Permanent Court against Switzerland, in which France denied Switzerland's ancient rights to certain "free zones" (customs-free zones) in French territory bordering Switzerland.

In addition to its strictly judicial functions, the peace treaties entrusted to the Court—on the model of certain national courts—the delivery, at the request of the League's Council, of "advisory opinions" on international law. Such opinions were rendered in twenty-seven cases; they probably occupied the Permanent Court as much as the regular judicial cases. The most famous advisory opinion was given in 1931 when the Court held, by a vote of eight to seven, that the customs union planned by the German and Austrian governments would violate the obligations incurred by Austria in the loan agreement of 1922. A considerable portion of the other advisory opinions were related to problems originating in the creation of the Polish state. The procedure in matters of advisory opinions was adapted by the Court to the procedure in the judicial cases. The Court's theory in this respect was given remarkable expression when the Council of the League asked for an advisory opinion in a Finnish-Russian dispute over the autonomy of western Karelia. Russia, though not a member of the League, categorically objected to any interference by the Court. Notwithstanding the fact that a legal expert, or a body of such experts, needs no "jurisdiction" for rendering a legal opinion, the Court declined to deliver the requested opinion in view of the exception taken by Russia. This was in accord with a quasi-judicial conception of its advisory activities.

Wherever the Court gave an opinion, it was to all intents and purposes followed by the League. Perhaps the rendition of advisory opinions was, on the whole, the more successful and the more propitious part of the Court's activities. Remarkably enough, the most important among the approved conditions for the accession of the United States to the Court consisted in a veto right against any proceeding for an advisory opinion in matters in which the United States "has or claims an interest."

Adjudication by tribunals other than the Permanent Court or by single arbitrators⁵⁸ was often provided in the agreements of the period, sometimes combined with an alternative jurisdiction of the Permanent Court. Ordinarily, such tribunals had to be formed in each particular

case by way of bilateral arrangements on the basis of the original agreement. Arbitration might nevertheless have been compulsory under the latter. A sensational case in point was that of the German journalist Berthold Jacob who, in 1935, was kidnaped on Swiss soil and abducted into Germany by agents of the Hitler government.⁵⁹ Despite this ruthless violation of Swiss sovereignty, the Hitler government first refused to comply with the Swiss demand that Jacob be returned to Switzerland. However, the Swiss government instituted proceedings against Germany under a compulsory arbitration treaty which had been concluded with Switzerland in 1928 by the then democratic German government. Upon the filing of the first Swiss brief in the matter, Hitler decided to return the journalist to the Swiss authorities.

The case well demonstrates the protection which compulsory arbitration may give a weak state against a powerful adversary. Of course, the object of the dispute was minor from the transgressor's point of view. Mussolini, bent on war against Abyssinia, made a mockery in 1935 of the Abyssinian-Italian arbitration treaty of 1928 and of an award rendered on the basis of the treaty by an arbitral tribunal (the Wal-Wal case).⁶⁰

A substantial number of judgments by single arbitrators or special tribunals were rendered on the basis of voluntary submissions (that is, submissions not obligatory under an earlier treaty), in part through the machinery of the Permanent Court of Arbitration. The United States was a party to such proceedings in about twenty cases. Several of the disputes in question were left over from World War I. Thus, in 1922, an arbitral tribunal held the United States liable to pay Norwegian subjects compensation of almost \$12,000,000 for the requisition of their ships during the war; the United States objected sharply to the decision but carried it out. Another award was delivered in a dispute between the United States and England (on behalf of Canada) over the sinking on the high seas of the Canadian bootlegger boat *I'm Alone* by an American Coast Guard vessel. The arbitrators—one from Canada and the other from the United States—gave judgment against the United States in 1933, after a trial lasting more than four years.

The strong dissents appearing in most of the important opinions—particularly in those of the Permanent Court—reflected uncertainties of international law ascribable in part to the newness of international

court practice. More disquieting was the frequent and successful opposition of defendant states to the jurisdiction of the Permanent Court where compulsory jurisdiction under the optional clause had been claimed. The paucity of awards in the other cases of compulsory arbitration seems also to suggest handicaps in the compulsory arrangements.

Latin America again exhibited its zeal for international law by concluding agreements and by organizing institutions for the peaceful settlement of international disputes. In addition to the short-lived Central American Court of Justice, organized conciliation of inter-American political disputes was agreed upon in 1923 at Chilean initiative by the multipartite Gondra Treaty (Gondra was the Chilean Minister) on the model of the Bryan conventions. A number of later inter-American multipartite treaties were concerned with the same subject, among them the Saavedra Lamas Treaty.⁶¹ Arbitration was the object of the General Treaty of Inter-American Arbitration of 1929, which—as an undertaking of the Pan American Union—duplicated and implemented the General Act of the League in the same way that the Saavedra Lamas Treaty duplicated and implemented the Kellogg Pact. Sixteen of the American republics joined the General Treaty, some under broad reservations, among which those made by the Senate of the United States almost nullified the practical value of the ratification.⁶²

There were in the same period still other less conspicuous inter-American treaties—multilateral, trilateral, and bilateral—on arbitration and conciliation. Add to all this the League conventions in which many American states were participants. A convention made in 1936 at Buenos Aires under the auspices of the Pan American Union undertook to “coordinate” at least the American Treaties, but raised new difficulties. The amazing hodgepodge is high-lighted by the fact that there has been not a single actual proceeding under any of the arbitration compacts. One controversy—between Santo Domingo and Haiti—was settled in 1923 under the Gondra Conciliation Treaty.⁶³ On the whole, we are again confronted with a disproportion between high-sounding documents and real achievement in Latin-American action.

International judicial organizations of another type—namely, mixed-claims commissions for individual claimants were set up in the twen-

ties as a result of revolutionary troubles in Mexico;⁶⁴ there were Mexico-United-States, Mexico-France, and other commissions of this type. No less important were the Mixed Arbitral Tribunals created by the peace treaties ending World War I.⁶⁵ They had jurisdiction over claims of individuals, based on war damages or other grounds under the treaties. Composed of a neutral chairman and two judges appointed respectively by the government of the victorious and that of the vanquished country in question, these tribunals were basically mixed-claims commissions of the American type; and that designation was preserved in a German-American agreement of 1922 supplementing the Peace Treaty of 1921 which incorporated many parts of the Treaty of Versailles. The jurisdiction of the Mixed Arbitral Tribunals, however, was larger and more diversified than the jurisdiction of a typical mixed-claims commission. Moreover, the private parties themselves were allowed to plead their cause, or they might act through their chosen representatives, whereas in the American pattern the pleading, and more or less the briefing, were the task of the government's agent. Though actually the parties under the new regulations rarely, and then only in very important cases, made use of their expensive privilege, and though most of the claims were of a routine nature and for moderate amounts, the burden laid upon the Mixed Arbitral Tribunals was formidable. For instance, more than 20,000 claims were submitted to the Franco-German Tribunal, about 10,000 to the Anglo-German Tribunal, and about 13,500 to the American-German Commission. Their disposition was facilitated through the collaboration of the agents of the two governments involved, who ordinarily were authorized by the parties to settle the claims.⁶⁶ The agents evolved among themselves a settlement procedure by which the great majority (for instance, in the case of the Franco-German Tribunal, five-sixths of the total) were disposed of out of court. In the courts themselves, the neutral chairmen practically determined the adjudication; but the achievements of a number of them were far from exemplary.⁶⁷ In remarkable contrast, the American judge, Edwin B. Parker, who, with the consent of the German government, had been made the umpire of the American-German Commission, received much praise from the German side for his objectivity.⁶⁸

The most serious occurrence in the history of the tribunals set up by the peace treaties was a decision rendered under the Treaty of Trianon by the Hungarian-Rumanian Mixed Tribunal. This court

assumed jurisdiction over suits brought before it by Hungarians who, having owned land in territories ceded to Rumania, had been expropriated by the Rumanian government in connection with a general agrarian reform. The Rumanian government, on specious grounds, took the view that the Tribunal lacked jurisdiction under the peace treaty and that consequently the decision was null and void. Rumania therefore withdrew her judge from the tribunal. The case is historically noteworthy not only because it presents a deplorable instance of disobedience to the decision of an international court, but also because it brought into relief the importance of the crucial problem of "excess of power" in international courts.

DOCTRINAL DEVELOPMENTS; ORGANIZATION OF LEARNING

In the nineteenth century, as we have seen, there was not much search into the fundamentals of international law. International jurists were generally contented with a rather crude form of positivism. However, fresh attempts at a deeper scrutiny started at the end of the nineteenth century, as exemplified by Triepel's work. This kind of inquiry grew steadily during the twentieth century, and especially after World War I.⁶⁹

A conspicuous aspect of it was a resurgence of "natural" law.⁷⁰ That resurgence was by no means limited to the international sphere. The emergence of totalitarian systems, with their arbitrary and oppressive lawmaking, necessarily nurtured the conviction that beyond and above the law ordained by the dictators there must be a better and higher, a "natural," law. Moreover, in international relations the law of nature seemed to offer a basis for the reconstruction of a more peaceful world, not to speak of the fact that writers of the nations defeated in World War I invoked it in an attempt to weaken or invalidate the peace treaties. Still, there was a deeper reason. Positivism had been affiliated with the scientific materialism of the nineteenth century. The widespread reaction against the latter was bound to shake the sway of positivism in the juridical field as well.

Regarding international law, two currents must be distinguished in the new emphasis upon natural law. In the first place, return to natural law has been demanded—and with increasing vigor after World War I—by writers adhering to Catholic dogma, among them some theologians.⁷¹ The Catholic Church alone has a comprehensive

and elaborate system of natural law, grown since the Middle Ages and widely cultivated in our day by Catholic institutions and authors. (There is no comparable Protestant law of nature.) Natural law of the Catholic mold, which has always been considered divine and therefore superior to any secular law, provides the Catholic Church with an authoritative position in the international sphere so far as the law is concerned.

With regard to history, the approach of these Catholic writers is to a considerable extent characterized by the assertion that the Spaniards of the "Golden Era" were the true founders of the modern law of nations. At the same time, the Middle Ages, because of their alleged spiritual unity, have been exalted as a glorious, if not the most glorious, epoch of international law.⁷²

However, the more common "natural-law" doctrine of the twentieth century has a different and secular character. Basically it is no more than the reemphasis upon the philosophical and other cogitative aspects of international law, and especially upon the role which "justice" and other moral values play in its development. As such it is merely the inevitable reaction to the cruder form of nineteenth century positivism. But it should be remembered that the great positivist of the eighteenth century, Bynkershoek, already had considered "reason" to be a source of the law of nations.

Along with the law-of-nature doctrine the just-war idea regained some ground. There was never any doubt that for moral or political reasons the cause of a belligerent might be judged just or unjust. Sentiments of this kind were most vigorous both during and after the World Wars, and spilled over into the legal area. Nevertheless, the new sponsors of the just-war idea did not repeat the old tenet that the belligerent who considered his cause to be just and the cause of his adversary to be unjust was exempt from the strictest observance of the rules of war with regard to prisoners of war, or to wounded and sick enemies, or with regard to the keeping of military agreements with the enemy; and only very few writers maintained that the rights and duties of the neutrals should vary under international law, depending on their belief or disbelief in the justness of the cause of one or the other belligerent. The problem now was much more limited. One outstanding aim of the just-war doctrine was to construct a legal basis for the punishment of those responsible for beginning and promoting the Second World War (as distinguished from those who, having

committed ordinary crimes during the war, did not offer such a juridical problem). The flaw in the application of the just-war idea is that the victor is called upon to decide whether his own cause or that of the defeated enemy was "just." Another application consisted in the theory which called "unjust" a war started through violation of an agreement for collective security, such as the Covenant of the League. But in this case the appraisal of the belligerent's action depends on the text and interpretation of the agreement, a legal affair. A belligerent acting illegally may have a "just cause" morally.

Still, neither "law of nature" nor "just war" took first place among the subjects of theoretical discussion in this period. Legal philosophers sought a new approach to international law by investigating the concept of sovereignty. That concept, indicating state omnipotence, had long been assailed as the result of persecution by state authorities of political parties; also, pacifists made sovereignty responsible for the horrors of war. In this setting, the new doctrines attacked the notion of sovereignty at its very roots. Attempts were made to sever the law ideologically from the state, with the higher dignity in the law. Applied to international law, the new theories were bound to clash with Triepel's "dualistic" conception which placed the emphasis upon the will of the state. In fact, the antisovereignty doctrines tended to substitute for the "dualistic" a "monistic" conception which, representing international and national law as essentially homogeneous, sought to establish a common source for them.

The monistic doctrine was inaugurated by the Netherlander Krabbe (1859-1936). While his better known publications appeared after the First World War,⁷³ he had laid the foundation of his theory previously. In his view states were originally the product of sheer command and force on the part of a sovereign; but in the modern idea of the state this "state sovereignty" pure and simple is giving way to the dominion of *spiritually* compelling norms, that is, to the "sovereignty of the law." Law is nothing external like the power of the sovereign of old; it springs from the sense or consciousness of right, which is an innate psychological quality of man like the moral or the religious sense. Wherever a state is so organized that the popular assembly functions as the source of "law," and particularly under the republican or parliamentary form of government, the sovereignty of the law emerges, because the significance of the popular assembly lies in the nation's sense of right. Acts of state are legitimate and valid only to

the extent that they conform to the rule of law, a notion well known from the natural-law doctrine—which Krabbe rejects. He asserts that international law comes into existence when people from different states, under the impact of external events, widen their sense of right so as to include international relations. The resulting rules of international law constitute real law. Their source is not the will of the states (demise of state sovereignty!) but the consciousness of law felt by those individuals whose interests are affected by the rule or who, as members of the government, judges, and so forth, are constitutionally called upon to take care of those interests. National and international law, therefore, have essentially the same quality—which is the monistic thesis. Nevertheless, international law, being the law of the larger community, takes precedence over the national law. In fact, Krabbe visualizes an already existing evolution that will finally bring about the rise of the “world state” founded upon popular representation and able to enforce a world-wide sense of right in every field. Krabbe thus stands not only for the monistic theory but for the supremacy of international law (called by him “supranational law”), which takes on a Messianic tone with him.

The monistic doctrine was improved by the Frenchman Duguit (1859–1928). His system, conceived after the experiences of the First World War⁷⁴ and therefore more sober, starts from premises kindred to those of Krabbe. He, too, dissociates the law from the state and derives the law from psychological faculties of the individual. With regard to the state, he takes a radical view which is remarkably antithetical to Hobbes’s teachings. To Duguit, the so-called state is merely a group of individuals living in the same territory and kept together through physical, moral, religious, economic, or other compulsion, exerted by the governing against the governed. The legal norm has a different source. It flows from the sentiment of solidarity, a “social fact” conducive to “social norms,” that are followed because otherwise the social group could not exist. The social norm is primarily economic or moral in nature but it assumes legal character when the members of the group, unanimously or almost unanimously, feel that the violation of the norm justifies the use of force in order to secure its observance.

The legal norms, then, are the crucial ones, characterized as they are by the urge toward enforcement. In this system, as in Krabbe’s, only individuals participate in the formation of the law, and the law

being supreme, the state possesses no sovereignty. Duguit's theory carries over to the genesis of international law. He admits that the individuals who bring international law into existence are mainly the "governing"; but this does not alter his basic assumption that international norms are engendered by the urge of individuals toward "solidary" action. He therefore arrives at the monistic view by way of sociological inquiry, whereas with Krabbe the accent is on the ethical or political aspects of the processes in which the law allegedly originates. Duguit, too, cavils at the term "international." He prefers "intersocial," a terminology negating the customary association of "international" with states, and emphasizing the "social-fact" character of the basis of international law. The supremacy of international law is not asserted by Duguit, nor does he believe in the necessary evolution toward a universal empire.

Duguit's teaching reflect the rise of social psychology. They have widely influenced other thinkers⁷⁵ and may prove fruitful in the future.

Another prominent monist, the Austrian Kelsen (born 1883), excludes any moral, psychological, sociological, or political data from his inquiry.⁷⁶ He has built up a "Pure Theory of Law" designed to show and to explain in strictly juridical terms the immanent logical relations of legal norms. In his system the analysis of the state is likewise a focal point. According to Kelsen, "state" is but one of many personifications, like God or soul, to which the human mind resorts in an effort to conceive a multitude of relations centering on a definite point; the mind frames them like emanations from a person endowed with a will, after the model of the human ego. Actually, the state is a system of legal norms, Kelsen holds; state and law coincide.

Nevertheless, he tries to disprove the sovereignty of the state. But his argument runs diametrically opposite to those of Krabbe and Duguit.

Within the various norms, Kelsen attributes a particular and pre-eminent role to the norms of international law. They are at the top of the hierarchy of norms. Starting from the bottom of this hierarchy, we find judgments or administrative acts that are binding because it is so prescribed by statutes or customs. Statutes and customs, in their turn, must be obeyed because it is so ordered by the constitution. And the constitution is binding, according to Kelsen, by virtue of international law which delegates its supreme legal power to a political

community once the latter exhibits all the characteristics of a state, as required by international law. This, then, is the supremacy of international law in its full glory. In Kelsen's conception monism is not limited to the homogeneity of national and international law; it implies the unity of the law of the whole world, since all the national legal systems have their common root in international law. The states being nothing but law, the democratic idea of "government by law" is made the rule of the world. Hence, in a novel form and in a modern spirit, Kelsen asserts the present existence of a *civitas maxima* in a far more comprehensive sense than was ever dared by Christian Wolff.

Kelsen attributes binding force above all to international custom. From the latter, the binding force of treaties is derived: *pacta sunt servanda* is in itself a customary rule. The binding character of international custom constitutes the initial hypothesis (*Grundnorm*) which is inherent in any legal system, but which cannot be subjected to further legal analysis; hence Kelsen, like Triepel but unlike Krabbe and Duguit, declines to answer the fundamental question why that custom is binding.

His conception of the primacy of international law, Kelsen represents merely as logically possible and materially satisfactory without denying logical consistency to a theory of international law which is based on the primacy of the national law. Still, his own system is by no means plausible. Particularly, one can certainly not accept the thesis that the various laws receive their binding force from a "delegation" by the international law. Nevertheless, Kelsen's system is imposing in its range and in the intellectual power displayed in its elaboration. These qualities, together with the unusual gift of penetrating criticism, are characteristic of his contributions to legal philosophy in general; they have aroused even wider comment than Duguit's.⁷⁷ Kelsen's inquiry into international law, however, though esteemed for its formal qualities, has met with little approval. Historically, it remains notable as the most radical form of monism in international law and as a reflection in legal terms of the idea of world democracy. Kelsen himself disclaims any political intentions. Hobbes, reaching almost the opposite results, had done the same.

Turning to the organization of learning, we find the picture characterized by two features which appeared early in the twentieth century but intensified after World War I: specialization and quanti-

tative growth. There was not much increase in representative systematic treaties. Oppenheim's work, as revised by Lauterpacht, came more and more to dominate the field. Special mention must be made of Hyde's *International Law, Chiefly as Interpreted and Applied by the United States*,⁷⁸ which by its limitation and emphasis represents a type of systematic treatment virtually unknown in other countries; in some way it reflects the prominent international position of the United States.⁷⁹

Periodicals multiplied from the beginning of the century. During the nineteenth century there were only two or three regular periodicals devoted principally to public international law; but there were more than fifteen before World War II, including a Japanese and several Latin-American publications.⁸⁰ Monographs multiplied, and learned societies and other institutions cultivating international law spread widely. Also, the place of international law in the curriculum of the universities grew steadily in importance.

The divergence of continental and Anglo-American learning, as stated for the preceding period, was still observable. Again, English and American writers participated to a very limited extent in the discussion of "fundamentals" such as the "monistic" and "dualistic" theories; they concentrated more or less on the positive material. They also became prominent in the inquiry into international organization or international administration, a subject for which an independent systematic treatment had been postulated as early as the eighties of the last century by the German-Austrian Lorenz von Stein.⁸¹ The Anglo-American interest in the matter was particularly stimulated through the work of the League of Nations. By the end of the period special courses on international organization were offered in American universities.

The differences between the continental and the Anglo-American school of thought have never been articulate or really antagonistic. Moreover, the trend of the period was definitely one of convergence, mainly as a result of the growing interest of English and American authors in continental thought.⁸²

There were, however, regional developments of a devious type. A Latin-American movement led by the Chilean Alvarez had started by the end of the nineteenth century. It stood for the recognition of a particular "American" (that meant practically Latin American) in-

ternational law as distinguished from the general international law.⁸³ The unusual activities of the Latin-American countries in the field of international law and the work of the Pan American Union formed the background of that program. Still, there was in inter-American legal relations neither the independent ideas nor the actual material to warrant the claim advanced. In fact, it received little applause outside Latin America, and even there noted scholars opposed it. In recent years the movement seems to have petered out.⁸⁴

The Latin-American adventure was innocuous enough. Being purely literary, it never resulted in political action. The nationalist impulse assumes a different and grave character in the hands of totalitarian regimes. They are apt to employ the literature on international law, which by definition addresses itself to the whole world, for a propagation of their ideologies and politics.

The Hitler government is an instance. While legal periodicals in general were subjected to a severe process of merger in which only a few survived, the number of periodicals on international law was allowed to rise, and there was a surprising number of monographs in the six or seven prewar years of this strange literary episode.⁸⁵

The first years of the National Socialist regime, when Germany's position was relatively weak, were characterized by a resurgence of the natural law and especially of the fundamental-rights-of-states doctrine as an instrumentality for combating the Treaty of Versailles. These fundamental rights included, according to the writers, the inalienable right of a nation to arm (that is, to use force) and its right to adequate "living space"—a conception canonized by a speech of Hitler's.⁸⁶ Attempts were also made to imbue international law with the notions of race and honor, notions linked together by the allegation of the particular intensity of the German sense of honor. They were declared to be the dominant motives of international action. Under the same theory, German minorities in foreign countries were held entitled at least to "cultural autonomy."

During the last prewar years the accent shifted to another conception. The "living space" grew into the "Great Space" appropriate for a leading nation on the strength of its innate virtues. The Monroe Doctrine was interpreted as a model for the domination of a continental area. The protagonist of this new doctrine was Carl Schmitt, a brilliant writer in the Goebbels manner who, after the advent of national socialism, had been awarded the chair of international law at

the University of Berlin. His views are set forth in a pamphlet published a few months before the outbreak of the war, entitled *Great-Space-Order, with Intervention on the Part of Foreign Powers Prohibited*. The subtitle reads: *A Contribution to the Reich Concept in International Law*.⁸⁷ The essay culminates in the idea that the world must be divided into Great Spaces, each controlled by a leading power. In defining the qualities necessary for being such a "first-rate subject of international law," Schmitt leaves little doubt on which nation he has in mind; these qualities are—apart from a "formidable measure of natural talents"—conscious discipline, superior organization, capacity to create by one's own strength the machinery of a modern commonwealth and to keep that machinery "firmly in hand." The leading power alone will irradiate its political ideas into its "Great Space."

The hostile attitude of National Socialism toward the political conception of the Western countries quite naturally was sometimes expressed in interesting criticism. For instance, one finds in National Socialist publications provocative remarks on the vanishing significance of neutrality or on the trend toward regional organization or on the "inflation" of treaty production.⁸⁸

Italian Fascism did not develop a similar school of thought.⁸⁹ This was perhaps a symptom of the inner weakness of Fascism, which, in Mussolini's own words, was not an "article for export." Besides, Mussolini, influenced by a kind of political romanticism, was reluctant to disturb too greatly the ways of Italy's legal science, offspring of an empire he hoped to renew.

Spain's present totalitarian regime presents a different picture. Its establishment gave rise to a tremendous number of publications strongly reflecting the ultranationalist and emphatically Catholic ideology of the regime.⁹⁰ Dozens of articles and monographs, some written by theologians, vied with one another in glorifying the writers of Spain's "Golden Age" and stressing the rule of the law of nature according to the tradition of the Spanish scholastics. In 1939 a government agency⁹¹ assumed guidance; under its auspices appeared a splendidly framed and voluminous periodical on international law.⁹² There had been no such publication in Spain previously.⁹³ Characteristically, the new Spanish school has accorded a conspicuous and most honorable place to Carl Schmitt.⁹⁴ A merit of the school con-

sists in some historical research into Spanish and contiguous international legal relations.

Soviet developments may likewise be looked upon as "regional" in the sense indicated, but their significance far exceeds that connotation.

SOVIET PRACTICE AND DOCTRINE ⁹⁵

The Union of Soviet Socialist Republics was formally established in 1923, almost six years after the Bolsheviks had seized power. In the international area the treaties concluded by the Czarist government were to all intents and purposes repudiated,⁹⁶ though international rights acquired by that government were held to have devolved upon the Soviets. Only a few of the Czarist agreements, such as the Red Cross Convention and the Postal Union, were recognized as still binding. New treaties were concluded by the Union to a far lesser extent than by the other great powers, preferentially with neighbor states within the Soviet sphere of influence.⁹⁷ The attitude of the Soviets toward multipartite arrangements was particularly reserved; their rejection of the 1929 Convention on Prisoners of War has already been referred to. However, the Soviets joined the Kellogg Pact—a step of no significance.

A novelty of Soviet practice was the "nonaggression" treaties entered into by the Soviet Union in 1933 with some adjacent countries, for instance, Iran and Rumania. The treaties, on the basis of earlier non-Russian proposals, defined aggression as the committing of certain enumerated overt acts, such as invasion or attack by armed forces or naval blockade, without reference to their "justness." The new device avoided the pitfalls of the just-war doctrine as well as of the pure and simple renunciation of war; but its worthlessness was graphically demonstrated in 1945 by the Soviet repudiation of the nonaggression treaty with Japan of 1941—a purely political action, not even justifiable by the *clausula rebus sic stantibus*.⁹⁸ Another interesting feature of Soviet practice, belonging more to the earliest period of the Soviet Union, was the bilateral neutrality treaties concluded with an eye to possible wars of the future and combined with nonaggression arrangements. Reciprocal renunciation of propaganda and boycott may likewise be mentioned as a feature of early Soviet compacts.

From subjection to international tribunals, the Soviets kept entirely aloof. Soviet repudiation of the Czarist treaties included even the harmless conventions of 1899 and 1907 on the Permanent Court of Arbitration. True, the Soviet Union has a member in the International Court of Justice at the Hague; yet this fact only extends Soviet power without imposing corresponding obligations. In the 1923 Treaty of Rapallo, commercial arbitral tribunals for commercial and other private disputes between a German and a Russian party were provided; but even these institutions, adopted by the Soviets also in treaties with a few smaller states, seem to have remained dead letters.⁹⁹ In 1930 the Soviet government was a party in an arbitral litigation which resulted from an arbitration clause in a vast mining concession granted by the Soviet government to Lena Goldfields, Inc., an English company. This proceeding was frustrated by the Soviet government under flimsy pretexts.¹⁰⁰

A statement by A. Y. Vishinsky is characteristic. He speaks of "international tribunals" organized on the basis of "modern bourgeois international law"—a law which, he says, serves to "veil the serfdom of weak nations to the dominant classes of powerful nations."¹⁰¹ Disregarding the element of propaganda, we find in this assertion a rejection of international law as it has grown up in the West throughout the centuries. As a matter of fact, the evaluation of international tribunals—that is, of the only chance to have international disputes decided *according to the law*—is a crucial test of the basic disposition toward international law. Certainly, in the modern world no state can exist without admitting, on the basis of reciprocity and tradition, envoys and consuls, and without concluding agreements with other states. But all this can be explained on the basis of expediency, especially if respect for international agreements is subordinated to purely political considerations as it is in Soviet practice.¹⁰²

We are confronted here with fundamentals of Soviet legal theory. According to Marx, law is no more than the expression of transient phases of the economic processes, a class tool with no intrinsically higher values.¹⁰³ As was seen, the appraisal of the law as a factor of secondary dignity is favored by deep-rooted Russian instincts. Very significantly, the Soviet government in its first phase demonstrated the implications of the Marxian theory by the suppression of the law faculties. Law on the family and other matters as codified by the Soviets was to be taught in the faculties of social science. The years

preceding World War II witnessed an official reemphasis on the importance of law, but then the idea was to strengthen the authority of the Soviet government.¹⁰⁴ Its significance was therefore confined to internal relations; but even there the judges were not granted the independence which alone makes a law above politics possible.

Lack of understanding for the higher values inherent in the law was bound to appear especially in international relations. In that field again the Russian past was a factor—the Byzantine Czarist tradition was not favorable to the recognition of a world-wide international community. The decisive factor, however, was Marx's doctrine. The Soviet constitution of 1923,¹⁰⁵ considering the dominance of the class struggle in the historical process, declared formally that the states of the world must be divided into two camps: the "camp of capitalism" and the "camp of socialism," the former being the breeding ground of national enmity, inequality, imperialist brutalities, and numerous other vices, while the latter possessed all the opposite virtues. These pronouncements, although omitted in the Constitution of 1936, remained significant as the expression of an ideology rooted in basic Soviet philosophy; they were actually followed far beyond 1936, and reaffirmed after World War II.¹⁰⁶

Remarkably the conception of "just war" has been made an official part of Soviet international law doctrine by no less a person than Lenin. According to him, a war is justified if it "serves the interests of the proletariat . . . and secures for it . . . liberation from the [capitalist] yoke . . . and freedom for struggle and development."¹⁰⁷ This doctrine fits perfectly into the Soviet system, demonstrating at the same time the faultiness and dangerousness of the "just war" conception in modern international law.

Publications by Soviet writers on international law must keep within the limits of official dogma. This presupposes a hostile attitude toward practically all the Western, the "bourgeois," teachings. Just as in other fields of knowledge, originality is ascribed primarily to Soviet thought. Because of other limitations also, Soviet writings on the subject do not conform to traditional standards of Western scholarship.

Perhaps the most significant feature of the pertinent Soviet literature is connected with the totalitarian and despotic character of the regime. The Marxist Soviet doctrine, like any other political doctrine, is to some extent open to interpretation. The interpretation by

any individual, however, may collide with the views—perhaps transitory—of ruling groups in the dominant system; or it may be represented by influential opponents as “bourgeois” or “subversive,” with disastrous consequences to that individual. Such a phenomenon, noticeable everywhere in Soviet learning, gives writings on international law a certain personal and dramatic quality.

The most widely known Soviet writer in this field is Korovin. As early as 1923 he published in Russian *International Law of the Period of Transition*¹⁰⁸—“transition” meaning the expected world-wide transition from the capitalist to the communist form of society. In the spirit of orthodox doctrine, Korovin held that there could not be a legal community with bourgeois states except for economic and related matters. He further asserted that states and diplomats are merely representatives of the governing class, and that a state as such has no legal personality. He approved intervention if undertaken for the sake of socialist revolution.

These views reflect the sentiments of the first “heroic” period of the Soviets, which had practically ended when the book appeared. Criticism based on tenets of economic materialism soon arose. In the now well known manner Korovin publicly confessed to having erred.¹⁰⁹ A new doctrine was advanced in 1935, shortly after Russia’s accession to the League of Nations, in a brief semiofficial textbook on international law by Pashukanis. This writer, though emphasizing the nature of international law as a means of class struggle, practically reversed Korovin’s doctrines. They were widely replaced by traditional views, including those of state sovereignty and of *rebus sic stantibus*. Yet Pashukanis was found to have gone too far to the right. He was attacked as a “counterrevolutionary and wrecker” and disappeared from the scene; he has never been heard from since. Instead, Korovin has again ascended to prominence which has outlasted World War II. It is in this recent period that he made a most significant statement. Criticizing Soviet writers who had represented Grotius as a “founder” of international law, he declared that Marx, Engels, Lenin, and Stalin were the founders of the contemporary science concerning society and the state.¹¹⁰

The Soviet developments bring into relief the question whether international law is a global institution.¹¹¹ In answering this question, one must make a distinction.

Historically the most important precept of the law of nations, that of the sanctity of treaties, can be traced far back through millennia preceding the Christian era. Inviolability of envoys, despite some qualifications and doubts, can likewise be taken as a pristine norm. These two principles may be considered as fairly global.

The broad conception of a "law of nations" or "international law," however, is something different. It is the product of Western Christian civilization, Catholic and Protestant. The phrase "European" law of nations, acceptable in Moser's and von Martens' day, became definitely wrong in the course of the nineteenth century. The American states were from the beginning within the orbit of the law of nations precisely because they formed part of Western civilization. On a large scale, the countries of that orbit employed international law for the establishment of steady relations with independent countries of other civilizations. Thus the Far Eastern and other foreign nations became familiar with international law; but it is difficult to say to what extent it took root in their minds. Russian developments are illustrative. Here we have a European country but not one of Western orientation. After Peter the Great, who so eagerly turned to German and Dutch culture, the Czars used international law in regulating their foreign relations; but the effect was limited. There was, for instance, the interlude of the Holy Alliance, spiritually more Russian than Western. In fact, the conception of a law of nations remained somewhat external to Russian thought, as is illustrated by the writings of de Martens. When the Bolsheviks broke away from the Western law of nations, the action was not too revolutionary; and the following development of Soviet doctrine amounts to a further and rapid weakening of the global character of international law.

There are now, in fact "two worlds," a development progressive at least in some respects. It may amount to an intermediate step toward "one world" of international law (which does not mean "one world" politically). Still, this is a matter of speculation. In any case, purely "national" ideologies and ambitions can no longer plunge the world into an all-involving war as Germany did in 1939 and Austria, to some extent, in 1914. Thus the number of possible generators of world wars has been reduced. At the same time, the material and psychological barriers against such conflicts have been immensely strengthened. The cold war and the carefully restricted "split war" are true expressions of this situation. Whatever the hardships which they impose, and how-

ever long they may last, they are preferable to a full-blown world war. And they leave open a chance of a solution not based solely on military factors. Psychological factors may exert a greater, and perhaps decisive, influence on the outcome of this gigantic struggle. One of the factors is connected with international law. The meaning of the Soviet "international law" is made clear by the fate of the satellites, which, being "democratic" according to Soviet doctrine, are the proper participants of that "law." Vyshinsky's phrase may well be applied to it; it veils the serfdom of weak nations to the dominant classes of powerful nations. In contrast, the true international law of the West maintains the independence of nations. Thus the Soviet challenge brings home the association of international law with the struggle for freedom.

Appendix I

SURVEY OF THE HISTORIOGRAPHY OF INTERNATIONAL LAW ¹

Legal history is known to be one of the most cultivated and most fertile fields of legal science; but, strangely, this observation does not apply to the science of international law, despite the particular significance of historical knowledge in this field.

The "history of the history" of international law may be traced back to von Ompteda's *Literatur des gesammten sowohl natürlichen wie positiven Völkerrechts*, published in 1785. Though the book is more a bibliography than a historical account, it contains a certain amount of analysis and criticism—in the Wolffian spirit—of earlier writings from antiquity onward in chronological sequence.² Ten years later the first inquiry into the political events relative to international law was published by an English writer, Robert Ward,³ under the title, *An Inquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius* (2 volumes, 1795). The book was the first literary enterprise of its author (born 1765), who later won some renown as a novelist. Its core consists of a stupendous if sometimes diffuse compilation of historical data and anecdotes, preceded by a lengthy theoretical Introduction. The emphasis is on the Middle Ages. Readable, and intelligently written, the book constitutes—considering its pioneering character—a respectable accomplishment. Without knowing the German positivists, Ward denies the existence of a universal law of nations, confining his discussion to the European scene. A number of valuable observations are scattered throughout the book, which contains, for instance, a helpful analysis of medieval treaties.

To the nineteenth century belongs the first study encompassing the history of both the political events and the doctrines of international law; namely, Henry Wheaton's *History of the Law of Nations in Europe and America Since the Peace of Westphalia*, first published in French in 1841.⁴ The period before the Peace of Westphalia is discussed in the Introduction, covering about a quarter of the work, which therefore extends, though in a limited way, over the full course of history. The book is for the most part compilatory and offers little original thought. This is especially

true of the doctrinal sections, which are filled with quotations. In the sections on political history, the diplomatic interests of the author account for a better result. The method used is scholarly, and the information furnished reliable. In its day, the treatise was well suited as a reference book for the diplomat in addition to the student. Its literary success—four English and four French editions and translations into Italian and Spanish—was well deserved.

In Germany, the line initiated by von Ompteda was followed by von Kaltenborn in his *Kritik des Völkerrechts nach dem jetzigem Standpunkt der Wissenschaft* (1847). The main subject—not sufficiently indicated by the title—is a critical analysis of the writings on international law since Gentili. Von Kaltenborn stands for positivism grounded in philosophy. Though his own theory is somewhat obscure, his penetrating and erudite criticism of the various doctrines makes his study an outstanding contribution to the nineteenth century science of international law. Another study pertaining to the same literary group was published four decades afterward by the Latin-Swiss, Rivier—later a professor at the University of Brussels—in his “Literarhistorische Uebersicht der Systeme und Theorien des Völkerrechts”; it was incorporated in the first volume of Franz von Holtzendorff’s important *Handbuch des Völkerrechts* (1888).⁵ Rivier follows von Ompteda’s example more closely than von Kaltenborn in so far as his purpose is primarily bibliographical and biographical. Within this limit, which he does not take too strictly, his work is almost perfect. With as much elegance of presentation as the subject permits, the treatise furnishes concise and abundant information on the writers and writings of international law. Frequently Rivier also expresses his opinion, which is invariably to the point and judicious, though here and there too much influenced by diplomatic reserve.

Regarding historiography of state practice in international law, we have to turn back several decades to François Laurent’s *Histoire du droit des gens et des relations internationales*, in many respects an extraordinary work. Three volumes, covering antiquity, appeared in 1851—the first publication of the author, a professor at the University of Ghent, who was then forty years old. The three were followed by fifteen more volumes up to 1870. Later Laurent put out thirty-three volumes on the *Principes du droit civil* (namely, of the Belgian civil law); eight volumes on *Droit civil international* (Private International Law); seven volumes on an *Avant-Projet de révision du code civil*; four volumes on a *Cours élémentaire du droit civil*, and a number of monographs. He died in 1887.

Laurent’s literary activities must be viewed against the background of contemporary Belgian politics. Belgium had fought for and won independence from the predominantly Protestant Netherlands, mainly because she

was a Catholic country. Indeed, the Catholic Church won a most favorable position in the Belgian Constitution. But soon this position and the political power of the Catholic clergy were heavily attacked. For decades Belgian politics was characterized by a bitter struggle between the liberals and the Catholics. Laurent, passionate and enthusiastic by nature, was an ardent and radical liberal; without going in for actual politics, he conducted his fight against clericalism and intolerance on a grand scale in his books, incurring thereby considerable trouble from the clergy and the government.⁶ In the work here under discussion, the *relations internationales* had prevailed from the beginning over the *droit des gens*; and the fourth and the following volumes were preceded by a second title, *Etudes sur l'histoire de l'humanité*. This title, while more appropriate, was not accurate either. In reality, the work is mainly concerned with the moral and religious phases of political history in its international aspects. The inclusion of Church matters was facilitated by Laurent's peculiar theory that the Church as such is a participant in the law of nations. His leading idea was God's immanence in the historical process; under His guidance, progress toward human solidarity is realized. As far as the Middle Ages were concerned, Laurent held that the supremacy of the papacy was necessary for the moral education of the peoples; but under modern conditions he asked for a belligerent vindication of state rights against the demands of the Church.

It follows that only part—in fact, a relatively small part—of Laurent's endeavor is directly concerned with the history of international law. Generally, the excessive speed of his production makes advisable a guarded use of his statements and materials. Nevertheless, his work is full of suggestive ideas and of valuable information, gathered from an impressively wide range of reading. While Laurent, in his day, enjoyed the admiration of Bluntschli and other outstanding scholars in the field, the attention paid to his work abated later. It is believed, however, that the usefulness of his labors is not yet exhausted.

A higher rank in the historiography of international law must be assigned to another Belgian, Ernest Nys (1851–1920), a professor at the University and an appellate judge in Brussels. Nys is the only scholar whose main field of inquiry has been the history of the law of nations. In contrast to Laurent, his venerated teacher and friend, he was given to the careful study of detail, political as well as literary, with the emphasis on the former. He also tried his hand at comprehensive treatises. In 1894 he published *Les Origines du droit international*, dealing with the practice and doctrine of the late Middle Ages and, to some extent, of the sixteenth and seventeenth centuries, which exhibits a remarkable breadth of outlook and acquaints the reader with a great deal of valuable information; but important and unimportant data are presented throughout on the same level

—in fact, events and writings are frequently listed rather than interpreted, and the organization is strikingly defective. Nys's *Le Droit international* (3 vols., 1912) is far more satisfactory; indeed, it is a great achievement. Though it is concerned with actual international law, its chapters have historical introductions of great value. They constitute the best available source of summary historical information in the field, though the documentation is meager. For implementation, one has to go back to Nys's special studies, which contain the essence of his investigations. Fortunately, most of them have been assembled in *Etudes de droit international et de droit politique* (2 vols., 1896 and 1901). Among his later publications, one may mention a series of articles on "Les Etats-Unis et le droit des gens" in the *Revue de droit international et de législation comparée* (1909), the monograph *Le Droit des gens et les anciens jurisconsultes espagnols* (1914), and his excellent Introduction to the volume on Vitoria in the Classics of International Law. Like Laurent, he was a liberal. In one of his most distinguished essays, "La Révolution française et le droit international,"⁷ he professed to the great principles of the Revolution, but he was neither radical nor aggressive. Nys writes as a historian. There is very little juridical or philosophical analysis in his inquiry; in fact, it is puzzling how little this judge was interested in the juridical aspects of his subject matter.

Among the nineteenth century writings we have still to refer to Franz von Holtzendorff's essay on the "Geschichtliche Entwicklung der internationalen Rechts- und Staatsbeziehungen bis zum Westfälischen Frieden"—a companion dissertation to Rivier's study, which was published in the same volume. Apart from the fact that the essay does not include the most important period of international law, it is again much more concerned with international "relations" than with law. The study is interesting as the product of a highly cultivated and cosmopolitan mind.

A synthesis of international practice and doctrine on Wheaton's model was sought by the English historian, Thomas A. Walker, in his *History of the Law of Nations*, of which, however, only the first part—from antiquity to the Peace of Westphalia—appeared (in 1899). The treatise, which also heavily tends to the side of general political history, is a scholarly work, but it is spotty and overloaded with extensive excerpts and unimportant details. References to it are very rare.

Even more than Walker's book, Butler and Maccoby's *Development of International Law* (1928) is dominated by the authors' interest in pure political history. Only in a few points is the development of doctrine indicated. The authors start with the sixteenth century, thereby supplementing Walker's account. They divide the discussed period into the "Age of the Prince," "Age of the Judge," and "Age of the Concert"—a scheme

rightly criticized as ill defined and overlapping. None the less, the volume offers in six hundred pages the most copious information available on numerous aspects of modern state practice regarding international law.

Political rather than doctrinal history of international law is also the subject of Wegner's *Geschichte des Völkerrechts*, published in 1936. In fewer than four hundred pages this treatise embraces the whole span of history. Unfortunately, in the author's mind the history of international law rotates around Germany and especially around Prussia. While his treatment is not typically National Socialist, it is naïvely patriotic and sentimental. For instance: "Prussianism in its innermost is full of noble meekness [*Sanftmut*]; therefore the customary caricatures of its nature exhibit so low a mendacity . . ." Otherwise the book is not without merit; its bibliography surpasses those of the early treatises.

An unusual, if not devious, publication remains to be mentioned, the *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre* (1923) by the Alsatian, Professor Redslob of the University of Strasbourg. There are, according to Redslob, four great principles: the binding force of treaties, the freedom of states, the equality of states, and the solidarity of states. He groups historical facts under the four headings, and then tries to show the vicissitudes of the principles during the various periods of history which he lays out in a peculiar manner. Redslob's plan could not succeed because the variety of relevant facts is too great to permit their subordination under four principles, however vague. One may even doubt whether any framework constructed around alleged principles of international law can be adequate for a full historical account. The treatise, which is not very well documented, has met with little attention.

Among regional studies, De Taube's inquiries into the international law of the Byzantine empire and of early Russia⁸ deserve special mention. More recently historiographies confined to doctrine have been published for Spain⁹ and for the Netherlands.¹⁰

Appendix II

JAMES BROWN SCOTT ON THE SUPERIORITY OF THE SPANISH SCHOLASTICS OVER HUGO GROTIUS

Up to and beyond the First World War there was little doubt among the writers on international law that Grotius was by far the most important figure in its doctrinal history. We have pointed out before that he was often called the "father" or "founder" of that discipline, and that the Spanish authors were rightly mentioned with distinction among his various "predecessors."¹¹ A far different view was taken by James Brown Scott (1866–1943) in a number of publications, especially (1) *Introduction to Grotius' De Jure ac Belli Pacis* in *Classics of International Law* (Oxford University Press, 1925); (2) *The Spanish Origin of International Law*—lectures given in Spain on Vitoria and Suárez, and published by the School of Foreign Service, Georgetown University, 1928; (3) *The Catholic Conception of International Law: Francisco de Vitoria, Founder of the Modern Law of Nations; Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations—A Critical Examination and a Justified Appreciation*, published by Georgetown University Press, 1934; (4) *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (a publication of the Carnegie Endowment for International Peace (1934));¹² (5) Introduction, written in 1939 and published posthumously in 1944, to *Selections from Three Works of Suárez* in *Classics of International Law*. The third, fourth, and fifth of the numbered items repeat or elaborate what was said in the lectures of 1928, adding translations of Vitoria's texts and various other appendixes.

Scott, a Protestant, served the last twenty active years of his life as a professor at Georgetown University. This being a Jesuit institution, one would not be surprised by Catholic leanings of a non-Catholic member of its faculty.¹³ However, Scott took a deprecating attitude against Protestantism. He speaks, for instance, of the "so-called Reformation."¹⁴ Quoting the English historian Walker, who has referred to the "legal literature of the Age of Reformation," he hastens to add: "I would prefer to say: after the discovery of America and in consequence thereof."¹⁵ He speaks of the "generous and unerring hand of the Jesuits," which "choked the tares of the Lutheran heresy."¹⁶ Referring to St. Bartholomew's Day

(August 24, 1572), he has no blame for the massacre, but has an ironical phrase for the victims—the Huguenots were, he says, “for tolerance insofar as toleration of their form of religion was concerned”¹⁷—a remark not even historically correct.¹⁸ Other Protestant groups are the object of similar aspersions.¹⁹ Scott, as will be seen, even tried to stigmatize Grotius.

Politically, the following remark by Scott is significant: “As an American of the North, I always consider Spain the Mother Country, as do all Americans.”²⁰ Of the English influence upon North American culture and law, he seems to have had little esteem or knowledge.²¹ He further intimates that in marital matters the jurisdiction of the state should be subordinated to the “spiritual power.”²²

With these extreme religious and political views, Scott’s theory of the historical origin of international law is closely connected. For him, the modern law of nations rests upon a Spanish foundation and was formulated in a Catholic atmosphere by Spanish theologians and publicists of the sixteenth and seventeenth centuries;²³ only “trifling additions” toward what the Spanish School had achieved were necessary in order to have “that system of jurisprudence which today we prefer to call international law.”²⁴ Grotius was in reality a member of the Spanish School and its “conscious expositor.”²⁵ He “plucked the ripe fruit.”²⁶

Scott does not seriously attempt to prove these far-reaching theses. His voluminous books contain, in addition to inaccurate²⁷ translations of the pertinent tractates of Vitoria and Suárez, circumstantial and utterly repetitious recitals of their teachings, accompanied by unremitting outbursts of enthusiasm and adoration. On the many hundred of pages hardly one is lacking in such epithets as “classic,” “magnificent,” “crowning glory,” “masterpiece,” “supreme intelligence,” “meeting the most exacting standard,” and “unanswerable.”²⁸ The reader is definitely made to understand that it would be overweening to oppose, or even to doubt, any of the opinions held by Vitoria or Suárez. Scott does not see that the two writers contradict each other at important points,²⁹ such as the divine character of the monarchy, which Vitoria assumed but Suárez denied. He has no word about the criticism with which Suárez’s theories have been met, especially by members of the Jesuit Order. And by failing to trace the theories of the two Spaniards back to their medieval predecessors, except for the customary references to St. Augustine and Thomas Aquinas, he gives them a wrong appearance of originality. With the historians of political science he is entirely unfamiliar. His utterly meager documentation is preferentially taken from a Catholic theological literature. He dislikes “publicists of our day who would consider as ‘medieval’ documentation from the Scriptures.” He thinks “that the Old and the New Testaments seem to have lost their vogue with writers of today who prefer science and quotations from each

other to revelation." In Scott's opinion medievalists were seeking not only a historical but a moral standard, while the standard of modern writers, difficult to describe anyhow, is more devoted to "mechanics."³⁰ It is therefore not surprising that he thought Vitoria "peculiarly apt in his choice of Noah as an authority upon which to base colonization and the creation of nations, because by mere length of days he had a longer experience than any other philosopher in such matters."³¹

A grave defect in Scott's writings consists in the fact that he and his translators, invariably render *jus gentium* as "law of nations" or as "international law"³²—terms which he uses indiscriminately. He is not aware that Vitoria invariably and Suárez widely employ *jus gentium* in the ancient and medieval sense of universal or quasi-universal law. As a result of this crude mistake Scott's exposition of Vitoria's and Suárez's doctrines abounds in erroneous references to their achievements in international law. In other respects, too, the translation is careless and misleading. No attempt is made to clarify such terms as *civitas*, *respublica*, *communitas*, *gens*, *populus*, and *natio*. Scott, as well as his translators, speaks indiscriminately of "state" and employs the term of sovereignty in an entirely indefensible way.³³

Scott's endeavor to glorify the two theologians leads him also to strange attempts at connecting their teachings with modern problems of international law. He does so with a naïveté which is truly disarming. Only a few instances need be given. "Many people will be surprised," he says, "to learn that Vitoria had expressly stated the mandate as exercised under the League of Nations."³⁴ Scott's only reason is that Vitoria deems the Spanish ruler entitled to undertake forcibly—without any "mandate" whatsoever—the administration of Indian lands because of the Indians' alleged incapacity for proper administration.

Another instance bears upon Vitoria's vindication of the right of the Spaniards to dig for gold, to fish for pearls, and otherwise to participate in "common goods" of the Indians. In this connection, Vitoria points out that even if the claims should not be justified by natural law, there would be sufficient consent of the greater part of the world on this matter [a reference to *jus gentium*] "mainly for the common good of all."³⁵ Scott's explanation is: "Vitoria apparently was a believer in the fundamentalness of 'the pursuit of happiness' before the phrase had been coined and minted from American gold."³⁶

Other instances are connected with what Scott considers to be a matter of nationality and naturalization. Vitoria advances two propositions:³⁷ (1) children born in Indian territory from a Spaniard domiciled there cannot be excluded either from the (Indian) "*civitas*" or from the "advantages enjoyed by other citizens"; (2) those who want to acquire domicile in one

of the Indian "*civitates*" by marriage or in any other way by which foreigners become citizens cannot be prevented from acquiring the domicile any more than any other person, and consequently they will enjoy the privileges just as others do, provided they submit to the same obligations.

Both propositions lack precision: we must remember that we are confronted with students' notes never supervised by Vitoria. In no case can they be taken in a strictly juridical sense. Vitoria derives the first proposition from Aristotle's theory according to which man is a "social animal" (*animal civile*). The idea seems to be that if the child could not participate in the advantages offered by the community where born it would be homeless, so to speak. "Citizen" (*civis*) in the medieval and post-medieval sense, prior to the French Revolution, is not related to the state but to the city³⁸ and is linked by Vitoria, rather vaguely, to the community where the *animal civile* has come to life. And with respect to the second proposition it is characteristic that Vitoria makes "domicile" the criterion for the enjoyment of the privileges of "citizens," whereas in the law the concepts of domicile and citizenship are fundamentally different. Here the meaning seems to be that a person (obviously Vitoria thought of a Spaniard) who through marriage, or in any other typical way, becomes a resident in an Indian community, is entitled to all the privileges enjoyed by the other residents. All this is rather vague. Moreover, the first pronouncement is obscured by the fact that Vitoria, not content with Aristotle's authority, tries to give it, even in the first place, legal support. He cites in favor of it a decree of Justinian's Code; but the decree cited has nothing to do with the subject, and the Code decree which he obviously has in mind fails to support his thesis in any way.³⁹

Scott sees no difficulty whatever in this complicated and entangled matter. It is all highest glory for Vitoria. Scott has no doubt that *civitas* and *civis* in Vitoria's text relate to states and their "citizens" in the modern sense. He interprets as a matter of course Vitoria's propositions in the light of the doctrine of the present law on nationality. Even from this point of view his comment makes little sense. On the first proposition he explains that it states "in unmistakable terms a principle of law which was centuries later to find its classical expression in an Amendment of the American Constitution . . ." "Without conscious intention perhaps [*sic*] on the part of the author, the doctrine of Vitoria has endowed each and every person born within any American Republic, with a separate and distinct nationality by the mere fact of birth within the Republic."⁴⁰ All this is baffling. Leaving aside philological objections it remains unexplained why a rule asserted by Vitoria for children of Spaniards domiciled in Indian territory should involve a broad rule of *jus soli* and why the rule applies to any American Republic. As far as the United States is concerned, it did not

occur to Scott to look at the English tradition which is the root of the American *jus soli*.⁴¹

To represent the Spaniard Vitoria as the spiritual father of the Fourteenth Amendment would seem to reach the climax, but it is surpassed by Scott's comment on Vitoria's remark that the child born in Indian territory to domiciled Spaniards, if excluded from the advantages of citizenship there, would not be a "citizen" anywhere. This is what Scott has to say: "So reasonable was the enlightened Spaniard that he eliminated by a stroke of his pen, or by a stress of his voice, the stateless person."

Similarly fantastic is Scott's comment on Vitoria's second proposition. "We are here," he asserts, "in the presence of the most important 'favored-nation' clause—the law of Vitoria is a perfect law, as perfect at any rate as human law can be which is designed for the welfare and happiness of an imperfect world." For readers unfamiliar with international law one may mention that Scott's "most important" "favored-nation clause" is an obscure invention of his own caused apparently by a confusion with the most-favored-nation clause found in commercial treaties.

It is a most significant fact that the first volume of the *Classics of International Law* published in 1917 had already been devoted to Vitoria with an excellent Introduction by Ernest Nys. Scott himself had added a short preface. Nys had high praise for Vitoria, but of course he did not indulge in Scott's uncritical exaltation and bias. Remarkably, in the preface to the 1934 volume, Scott does not mention the publication of 1917,⁴² and nowhere does he indicate why the duplication was necessary. In a few footnotes the Nys edition is cited rather casually with praise.

While Scott considers Vitoria as the founder of international law, he presents Suárez as a similarly eminent figure in the early history of international law. Of his *Catholic Conception*, the greater part is devoted to Suárez. The Introduction to *Selections from Three Works of Suárez* is much shorter. In the first-mentioned treatise such matters as the *Defensio Fidei* and Suárez's theories on custom, prescription, and other topics of general jurisprudence are in the fore. Much less is said about Suárez's role in the formation of international law. But Scott creates a large penumbra by the indiscriminate use of the phrase "law of nations." His comments on Suárez's theories are of the same type as those on Vitoria. For instance, Suárez states that no single ground of "just war" is exclusively reserved to the Christian princes; natural law may grant such grounds also to princes who are unbelievers.⁴³ This general proposition is then qualified by subtle and involved distinctions which in the interest of the Christian faith provide some exceptions in favor of Christian rulers. If one adds that according to Suárez infidel princes are obligated to admit missionary work

and may be deposed by the Pope in the interest of the faith,⁴⁴ Suárez's proposition can hardly be considered as indulgent; in fact, the admission that an unbelieving prince may wage a just war was inescapable in order to permit Christians the sale of arms to unbelievers—times had changed since the Third Lateran Council (one has to think of the flourishing trade of Venice and other Italian cities with the Ottoman Empire). Scott does not indicate this practical aspect of Suárez's general proposition.⁴⁵ He simply comments, "Suárez, although a theologian, was also a man of reason and a broad-minded humanitarian."⁴⁶

Scott then turns to an explanation offered by Suárez himself for his proposition. By a rather strained argument, Suárez imagines two infidel princes, one preventing his people against their will from "worshipping the one God and obeying the law of nature," whereas the other prince wages war against him on this ground—in such a situation the war would be "just."⁴⁷ Scott comments as follows: "The 'explanation' proves that if men of Suárez's stamp could have had their way the Reformation might never have occurred."⁴⁸ It is difficult to see what was in Scott's mind, except that his remark indicates a rather low estimate of the Reformation.

Elsewhere Suárez deals extensively with the theory of custom (customary law). Contradicting unnamed earlier writers, he remarks that women and persons below twenty-five years, unless infants, may participate in the formation of a custom with legal effect.⁴⁹ Scott offers the following comment: "Suárez, celebrated as he was and living in the world, but, as it were, not a part of it, curiously had observed that this perfect community [the state] consisted not merely of men but of men and women." He was aware of a more "modern age." Scott then refers to the Nineteenth Amendment of the Constitution, which grants the voting right to women, and continues, "Over three centuries ago Suárez . . . declared in words which cannot be often enough quoted, as they do him infinite credit, that women and persons below twenty-five years [*follows the passage referred to above*]. Francisco Suárez is rightly considered as a great theologian and philosopher and a no less great jurist . . . but in the quotation we have just made . . . he proclaims himself as a feminist in a day when feminism was hardly a dream, let alone a hope."⁵⁰

Scott's lack of understanding not only leads him to such absurd exaggeration, but prevents him from even comprehending Suárez's real merits. Suárez's statement on the interdependence of states is verbally reproduced with such meaningless remarks as "Comment would be as impertinent as superfluous."⁵¹ Scott proceeds then to a comparison between Suárez's statement and Vitoria's remark on the force of law inherent in the *jus gentium* and Vitoria's idea of a world state. The comparison turns out to be in disfavor of Suárez, mainly because Scott erroneously confuses Vitoria's

jus gentium with international law, but also because he considers Vitoria's idea of the world state as superior to Suárez's definitely more modern and useful notion of the interdependence of states.⁵² Furthermore, Suárez's dual interpretation of *jus gentium*—his most original contribution to the genesis of international law—is dealt with by Scott perfunctorily and in a way which gives the impression that the dual interpretation is of ancient Roman origin.⁵³

All in all, Scott's appraisal of Suárez's teachings is utterly inadequate, or even meaningless, a fact which makes the disproportionate dimension of the publications which he was allowed in this field, even more startling.⁵⁴

An entirely different picture is presented by Scott's discussion of Grotius, and especially by his Introduction to the first volume of the Classics—a task which he, as the editor-in-chief of the Classics, likewise assigned to himself, though there was no lack of experts on Grotius. (The translation of Grotius' work and of the selections from Suárez was done by other persons.) The Introduction consists of forty-two pages, counting ten on the Law of Spoils, which Grotius we know left unpublished, except for the chapter on the freedom of the seas. The Law of Spoils is marked by numerous references to Spanish authors.⁵⁵ In addition, the genesis of this tractate seemed to Scott to offer several opportunities for deprecating Grotius and Protestantism.⁵⁶ No more than eight or nine pages are concerned with an analysis, or rather a summary, of Grotius' main treatise. Such important matters as his doctrine of neutrality or his *Temperamenta* are not even mentioned. Only a few cursory and incoherent data are given about Grotius' personal development. There is no bibliography of the literature on Grotius; only such few publications on him are mentioned as seem to fit into Scott's preconceived line of thought.

Scott's attitude toward Grotius is conspicuously at variance with his attitude toward the Spanish theologians. He has some conventional phrases of praise for Grotius, but basically represents him as an "advocate"—telling us that an advocate "can play a beneficial role in the betterment of the world." Here is an explanation for Scott's particular interest in the Law of Spoils. The Dutch historian Fruin showed in 1925⁵⁷ that Grotius had included parts of the Law of Spoils in his great work of 1624. "We are permitted to think, therefore," Scott concludes,⁵⁸ "that the advocate of 1604 was practising his profession when he addressed himself some eighteen years later to the composition of the elaborate treatise"—a judgment in no way supported by Fruin. Scott tells us further that Grotius "was not an advocate in the prize case for nothing."⁵⁹ He also was a man "to bow before the accomplished fact"—another unfounded aspersion.⁶⁰ Moreover as a Protestant he "rejected religious authority" because he re-

jected "the authority of the Universal Church."⁶¹ Nevertheless, in our days he would probably be considered "reactionary"⁶²—Vitoria, we remember was a "liberal" according to Scott.⁶³ Still, Scott's greatest indignation was aroused by the fact that Grotius did not cite Suárez frequently enough, and especially that he did not cite him in the *Prolegomena*.⁶⁴ Scott gives the following explanation:

"Grotius' wish was not only to be read by princes, but to please them to such a point that he might enter into the service of one or the other of them . . . Had not two kings, and consequently two possible protectors, already shown their displeasure [with Suárez's *Defensio Fidei*] . . . The Netherland courtier in exile might indeed secretly profit by the labors of the Spanish Jesuit and internationalist in a foreign country without exposing himself to the censure of the lords of creation . . ."

This repellent slur, made first in the 1928 *Spanish Origin*,⁶⁵ was so much in Scott's mind that he repeated it in a slightly mitigated form in his last publication, the Introduction to *Selections from Three Works of Suárez*, devoting four of his thirty-eight pages to the subject.

The attacks on the moral and political character of Grotius evidently were designed to emphasize the immense moral superiority of the Spanish theologians. It was more difficult to substantiate their alleged superiority in matters of theory. Actually Scott does not offer any substantiation of this kind. He searched merely for quotations from other writers which seemed to support his thesis, and this search led him to what he obviously believed to be a treasure trove. A historical essay by J. Koster, a member and later vice president of the highest court of the Netherlands, had surveyed the spiritual forces generative of modern international law, and, on arriving at the Grotian era, had remarked: "Nous sommes arrivés à la plénitude des temps; une main se tend pour cueillir le fruit devenu mûr."⁶⁶ Here we have a distinguished compatriot of Grotius—perhaps a Protestant!—seeming to state that Grotius (plainly intended in the quoted words "une main") did nothing more than "pluck the ripe fruit." Not an impressive intellectual achievement! Scott uses the phrase as a catchword.⁶⁷ In reality he distorts the idea of Koster, who simply depicted the compelling character of the onward-pressing evolution, but had not the least intention of disparaging Grotius.⁶⁸ On the contrary, Grotius is to him the central figure in the history of international law, and the Spaniards and many others are merely Grotius' "forerunners," with Gentili and Suárez in the lead.⁶⁹

As far as I know, Scott's publications have never been subjected to critical investigation. His views have been eagerly accepted by Franco Spain⁷⁰ and by a few non-Spanish writers following the orthodox Catholic point of view,⁷¹ while other writers of the latter group show a marked re-

serve.⁷² Still it is a fact that Scott's publications have produced a definite effect upon public opinion. As I have observed on various occasions, people consider it as somewhat quaint and old-fashioned to represent Grotius rather than the Spanish theologians of the Golden Age as the real founder of the modern doctrine of international law. External circumstances, it is believed, have contributed greatly to the efficacy of Scott's writings. Scott became Secretary of the Carnegie Endowment for International Peace and Director of its Division of International Law, general editor of the *Classics of International Law*, editor-in-chief of the *American Journal of International Law*, president of the American Institute of International Law, and finally a member and sometime president of the Institut de Droit International at Brussels. He was one of the most influential figures in the contemporary literature on international law, especially within the American area.⁷³ To some extent it is explicable that the stately volumes published by such a high authority within the framework of impressive series should find credence with many people. The general absence, at the time, of historical interest in international law was probably also a factor.

Still to be mentioned is a German writer who by a partly independent line of thought advanced views similar to those of Scott: Ottenwälder, who died in 1945 a victim of World War II at the age of thirty-five. Graduating in Catholic theology and in philosophy, he was active in the German Catholic Youth movement and wrote the essay *Zur Naturrechtslehre des Hugo Grotius*, which was published in 1950 by his former teacher, Professor Brinkmann, then a political scientist at Heidelberg University.

The essay is greatly confused and desultory, conveying the impression that the author was prevented from giving it the necessary final revision.

Ottenwälder is primarily interested in Grotius' general philosophy of law and (himself without legal training) tells us by way of a rather obscure argumentation that Grotius lacked a sense for the significance of the law. In international law he discusses at some length the scholastic just-war doctrine, but otherwise his remarks are brief and perfunctory. He invariably translates *jus gentium* by *Völkerrecht*, thus causing the same fundamental confusion as Scott. Stating that the beginnings of that law must be sought before Grotius, he continues abruptly, citing Scott:⁷⁴ "Consequently [*danach*] Vitoria is the founder of international law and Grotius his most important disciple." However, he recognizes some originality in Grotius. The latter, we are told, developed his concept of justice from Roman civil law and built his system of natural law on this basis—a perplexing assertion bolstered by a twisting reference to Vollenhoven.⁷⁵ And there are more of Ottenwälder's strange allegations.⁷⁶

Professor Brinkmann explains the publication of the essay in part as

inspired by piety, but he also calls it "the first link of German research in the recent international transformation of the picture of Grotius." For this transformation Professor Brinkmann refers to the French neo-scholastic school, which, however, never did concern itself with the historical position of Grotius; in fact, its main representative, Le Fur,⁷⁷ called Vitoria and Suárez "precursors" of international law. Professor Brinkmann also repeats Scott's phrase, that Grotius "plucked the ripe fruit." The interest in American thought which spread in Germany after the Second World War has obviously miscarried in this case.

There was, however, a truly great jurist who prior to Scott gave vent to similar opinions: Josef Kohler. His *Grundlagen des Völkerrechts* (1918) devotes six or seven pages to the doctrinal history of the law of nations, calling the Spaniards the real founders of international law and mentioning specifically Covarruvias, Vitoria, and—surprisingly—Molina but not Suárez. Kohler admits that Grotius' *On the Law of War and Peace* acquired a justified reputation all over the world; but, considering the merits of the post-glossators (?) and the Spaniards, he deems it a historical perversion to call him the father of natural law and of international law.

It is not worth while to point to the divergencies between Scott's and Kohler's statements; in substance they are similar. The explanations, however, are entirely different, Kohler, born in 1849, was a genius, a scholar, and an artist⁷⁸ who, fully aware of his unique gifts, developed in his late years an increasing lack of self-control. The First World War, which he survived by only one year, upset him completely. A fervent patriot, he expressed his sentiments against the enemies of his country in a tremendous number of publications of extreme and vituperative violence.⁷⁹ His *Grundlagen des Völkerrechts* (1918), prepared, according to the Preface, "under the tempest of war," contains a number of those outbursts. He warns that "international law must not become a concoction which English despotism and French rhetoric want to impress upon us," and asserts that neither England nor France has been able in modern times to create a real legal science.⁸⁰ However, England rather than France was to him, as to many other Germans of that time, the main foe. According to Kohler, in the event of England's victory, the law of nations would entirely collapse, and idealism and morality would then perish completely.⁸¹ This anti-English attitude was strengthened by his Catholic background, the influence of which became pronounced in his late years.⁸² Perhaps the most characteristic manifestation of his state of mind is what he has to say about Gentili, the double convert to Anglicism and Protestantism. He simply calls him a "hunter of anecdotes" and a "juristic clown" (*Hanswurst*). Still, it has never been doubted that Gentili was an eminent jurist, a prominent figure

in the history of international law; and Kohler never tried to substantiate that affront.⁸³ Kohler's faithful son, Arthur Kohler, writes in *Joseph Kohler Bibliographie* (1931), page 6: "The war articles are also listed although the Master [Joseph Kohler] had in many cases abandoned the opinions advanced under pressure of the war; those opinions must be merely appraised as a result of that pressure." This explanation applies also to Kohler's statements mentioned above.

In conclusion, we may state that there is not the least proof for the assertion that the Spaniards of the "Golden Age" were the founders of international law.

Notes

Abbreviations: *Ency. Soc. Sc.* = *Encyclopaedia of the Social Sciences*; *Nys, Etudes* = *Nys, Etudes de droit international et de droit politique*; *Nys, Origines* = *Nys, Les Origines du droit international*; *Oppenheim* = *Oppenheim, International Law*, Vol. I, 7th ed., by Lauterpacht, 1948, Vol. II, 7th ed., by Lauterpacht, 1952; *Recueil des cours* = *Académie de droit international, Recueil des cours*; *Rev. dr. int.* = *Revue de droit international et de législation comparée* (Brussels).

[bibl.*] indicates a particularly helpful bibliography.

CHAPTER I. ANTIQUITY

PRIMITIVES—ANCIENT ORIENT

1. Klineberg, *Social Psychology* (1940), 79; Franz Boas, *General Anthropology* (1938), 400, stressing economic aspects; Ruth Benedict, *Patterns of Culture* (1934), 30, 37; Westermarck, *The Origin and Development of the Moral Ideas*, I (1906), 335; Ratzel, *Völkerkunde* (1885), Introduction, 91, 94, I, 200, II, 209, and concerning war, both volumes *passim*; Malinowski, "An Anthropological Analysis of War," *American Journal of Sociology*, XLVI (1941), 521; regarding American Indians, *U.S. Bureau of American Ethnology Bulletin*, LXXVIII (1925), 215, 220, 252, 400, and *passim*. The advice of the late Professor Ruth Benedict, Department of Anthropology, Columbia University, is gratefully acknowledged.

2. Rostovtseff, "International Relations in the Ancient World," in Walsh, *History and Nature of International Relations* (1922), 31, 40; Heuzey-Thureau-Dangin, *Restitutions matérielles de la stèle des voutours* (1909). Cf. also Poebel, "Der Konflikt zwischen Lagas und Umma," in *Oriental Studies* (in honor of Paul Haupt—Baltimore, 1926), 221; Korošec, *Hethitische Staatsverträge* (1931), 35, 62 n. 1, 93; and the observations by Tod and Pinches in the *Journal of Transactions of the Victoria Institute*, XLIV (1912), 277, 294 (a translation of the text of the stele on p. 296). Ruiz Moreno, *El Derecho internacional público antes de la era cristiana* (Buenos Aires, 1946), accumulates with little discernment a great many facts bearing upon "international" relations of the period.

3. Korošec, *op. cit.*, 58; Rostovtseff, *op. cit.*, 41; R. von Scala, *Die Staatsverträge des Altertums* (1898), Nos. 1–14; Mettgenberg, "Vor mehr als 3000 Jahren," *Zeitschrift für Völkerrecht*, XXIII, Supp. (1939), 22; Rey, "Relations internationales de l'Égypte ancienne du 15^{me} siècle avant Jésus-Christ," *Revue générale de droit int. public*, XLVIII (1941–1945), 35.

4. To a considerable extent the Hittite documents relate to vassalage, an institution different in character from what is called here "law of nations." For instance, the duty to extradite fugitives, which is in point, is natural with a vassal, but not so between independent rulers.

5. Datings of the treaty differ by about twenty years.
6. D. Mallet, "Les Premiers Etablissements des Grecs en Egypte," *Mémoires publiés par les membres de la Mission archéologique française au Caire*, Vol. XII (1897), especially p. 58 (regarding autonomy). The main source is Herodotus, II, 178.
7. See Bentwich, *The Religious Foundations of Internationalism* (1933), 59; König, "Zum Völker- und Kriegsrecht im Altertum," *Zeitschrift für Völkerrecht*, XI (1920), 155; Schwally, *Semitische Kriegsaltertümer*, Vol. I, *Der heilige Krieg im alten Israel* (1901). Regarding John Selden's *De jure naturali et gentium juxta disciplinam Ebraeorum* (London, 1640), cf. Herzog, "John Selden and Jewish Law," *Journ. Comp. Legisl.*, XIII, 3d Ser. (1931), 236, 239.
8. Viswanatha, *International Law in Ancient India* (1925), in which, surprisingly, there is bare mention of the Code of Manu; Pramathanath Bandyopadhyay, *International Law and Custom in Ancient India* (1920); Armour, "Customs of Warfare in Ancient India," *Transactions of the Grotius Society*, VIII (1923), 71. As for China: Teshu Cheng, "International Law in Ancient China (1122-249 B.C.)," in *Chinese Social and Political Science Review*, XI (1927), 38, 251. Siu Tchoan-pao, *Le Droit des gens et la Chine antique* (1926), merely discusses certain currents, mainly pacifist, in ancient Chinese thought. W. A. P. Martin, "Les Vestiges d'un droit international dans l'ancienne Chine," *Rev. dr. int.* (1882), 227, is of limited scope. A French translation of the text of Confucius' Grand Union in Le Fur and Chklaver, *Recueil des textes de droit international public* (2nd ed., 1934), 2. Cf. also Bentwich, *op. cit.*, 181; Laurent, *Histoire du droit des gens*, I (1851), 78; Kalidas Nag, *Théories diplomatiques de l'Inde ancienne* (1923). Von Holtzendorff, "Die geschichtliche Entwicklung der internationalen Rechts- und Staatsbeziehungen," in his *Handbuch des Völkerrechts*, I (1885), 137, discusses ancient Oriental developments at some length, with little consideration of their legal aspects.
9. Kohler, *Grundlagen des Völkerrecht* (1918), 18.
10. Cf. Ward, *An Enquiry into the Foundation and History of the Law of Nations*, II (1795), 475; Pütter, *Beiträge zur Völkerrechtsgeschichte und -wissenschaft* (1843), 79.
11. Pramathanath Bandyopadhyay, *op. cit.*, 48.
12. Busolt-Swoboda, *Griechische Staatskunde*, II (1925), 1260. See furthermore, regarding barbarian customs during the Great Migration, Paradisi, *Storia del diritto internazionale in medio evo*, I (1940), 184, and about English practices in the early Middle Ages, Schwarzenberger in *Brit. Yb. Int. Law*, XXV (1948), 60.

ANCIENT GREECE

13. Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (2 vols., 1911), is an exhaustive study of considerable value, but its statements are not always reliable, particularly since the author is given to rash generalization. Pauly-Wissowa's *Realencyclopädie der classischen Altertumswissenschaft* ("Proxenoï," "Metoikoi," "Amphictyonia," etc.), is likewise a main source of information. See furthermore Paradisi, *op. cit.*, Part I, "L'Eredità del mondo antico"; Busolt-Swoboda, *op. cit.*, 1460 ff.; Kahrstedt, *Griechisches Staatsrecht* (1926); Francotte, *La Polis grecque (Studien zur Geschichte und Kultur des Altertums)*, Vol. I, nos. 3-4, Paderborn, 1907), 148; Glotz, "Droit des gens dans l'antiquité grecque," *Académie des inscriptions et belles-lettres, Mémoires*, XIII, Part I (1923), 91; Laurent, *Histoire du droit des gens*, II (1851). Regarding treaties, see

von Scala, *op. cit.*, *passim*, and Egger, *Etudes historiques sur les traités publics chez les grecs et chez les romains* (1866).

14. A. R. Burns, *Money and Monetary Policy in Early Times* (1927), 90.

15. M. Niebuhr Tod, *International Arbitration Amongst the Greeks* (1913); Raeder, *L'Arbitrage international chez les hellènes* (1912); De Taube, "Les Origines de l'arbitrage international: Antiquité et moyen âge," in *Recueil des cours*, XLII (1932), 5 [bibl.*]. For a rather popular account see Ralston, *International Arbitration from Athens to Locarno* (1929), 153.

16. Busolt-Swoboda, *op. cit.*, 1240 ff.; Dareste, *Nouvelles études d'histoire du droit* (1902), 38 ff. ("Le Droit des représailles").

17. Busolt-Swoboda, *op. cit.*, 485, 556, 1257.

18. Phillipson, *op. cit.*, II, 370, and literature *infra*, p. 313 n. 73.

19. Busolt-Swoboda, *op. cit.*, 1260.

ANCIENT ROME

20. In addition to the works of Phillipson, Laurent (Vol. III), Paradisi, and von Scala—all cited before—see Heuss, *Die völkerrechtlichen Grundlagen der römischen Aussenpolitik in republikanischer Zeit* (1933); Brassloff, *Der römische Staat und seine internationalen Beziehungen* (1928); Seckel, *Ueber Krieg und Recht in Rom* (1915); Täubler, *Imperium romanum* (1913); Fusinato, "Le Droit international de la république romaine," *Rev. dr. int.* (1885), 278.

21. Phillipson, *op. cit.*, I, 327; Pauly-Wissowa, *op. cit.*, "Fetiales"; Heuss, *op. cit.*, 18; Tenney Frank, "The Import of the Fetal Institution," *Classical Philology*, VII (1912), 335. Among the earlier studies the most comprehensive is Fusinato, *Dei feziali e del diritto feziale* (1884).

22. Paradisi, *op. cit.*, 336.

23. Dig. 49, 15, 5, 2. But, characteristically, this is only an incidental remark.

24. Some pertinent points have been elaborated by the writer in "The Significance of Roman Law in the History of International Law," *Univ. of Pa. Law Rev.*, C (1952), 678. Nys, *Le Droit romain, le droit des gens et le Collège des Docteurs en droit civil* (1910), has little relation to the discussion in our text.

25. *Infra*, p. 74.

26. See on this Triepel, *Völkerrecht und Landesrecht* (1895), 212; Ago, *Il Requisito dell'effectività dell'occupazione in diritto internazionale* (1934), 43.

27. Sohm, *Institutionen: Geschichte und System des römischen Privatrechts* (17th ed., by Mitteis and Wenger, 1949), 64; Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed., 1952), 100; Pauly-Wissowa, *op. cit.*, "Jus gentium"; Brassloff, *op. cit.* More recently the connection of *jus gentium* with the legal position of foreigners has been questioned: Fritz Schulz, *History of Roman Legal Science* (1946), 73, 137; Lombardi, *Sul concetto di jus gentium* (1947). The controversy does not, however, affect the basic meaning of the term.

28. Moritz Voigt, *Das jus naturale, aequum et bonum und jus gentium der Römer*, I (1856); Voggensperger, *Der Begriff des 'Jus naturale' im römischen Recht* (thesis, Basle, 1952); E. Levy, "Natural Law in Roman Thought," *Studia et Documenta Historiae et Juris* (1949), 1. Maschi, *La Concezione naturalistica del diritto et degli istituti romani* (1937), covers a much larger field.

29. E. Levy, *op. cit.*, 17.

CHAPTER II. THE MIDDLE AGES—WEST

BARRIERS TO INTERNATIONAL LAW

1. General literature: Nys, *Origines*; Wegner, *Geschichte des Völkerrechts* (1936), 65; Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe* (2 vols., 1795), especially chaps. viii and ix; Pütter, *Beiträge zur Völkerrechtsgeschichte und -wissenschaft*, 47. On the structure of the Holy Roman Empire, cf. Bryce, *The Holy Roman Empire* (4th ed., 1923); Gierke, *Political Theories of the Middle Age* (1927—trans. Maitland from *Das deutsche Genossenschaftsrecht*, Vol. III, 1889), sec. 11; Ercole, "Impero e papato nella tradizione giuridica bolognese e nel diritto pubblico italiano nel Rinascimento," secs. xiv–xvi, *Atti e memorie della r. deputazione di storia patria per le provincie di Romagna*, Series IV, I (1911), 1; and Schnürer, *Die Anfänge der abendländischen Völkergemeinschaft* (1932).

2. Nys, *Origines*, 80; *Ency. Soc. Sc.*, "Truce and Peace of God" [bibl.*].

3. Resolutions of the Second Lateran Council, Canon XXIX (Mansi, *Sacrorum conciliorum nova et amplissima collectio*, XXI [1769], 533).

4. J. F. C. Fuller, *Armament and History* (1945), 45.

5. See, e.g., Ward, *op. cit.*, I, 252. According to Saldana, "La Justice pénale internationale," *Recueil des cours*, X (1925), 301, Pope Innocent III, in an Encyclical, did not object to the use of poisoned weapons. I have been unable to verify this statement.

6. More on this in Nussbaum, "Forms and Observance of Treaties in the Middle Ages and the Early Sixteenth Century," in *Law and Politics in the World Community* (symposium in honor of Hans Kelsen ed. by Faculty of Pol. Science, Un. of California, 1953). See also Wild, *Sanctions and Treaty Enforcement* (1934), 84; L. Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924) and book review in *Göttingische Gelehrte Anzeigen* (1914), 458; De Maulde La Clavière, *La Diplomatie au temps de Machiavel*, III (1893), 233. Esmein, "Le Serment promissoire dans le droit canonique," *Nouvelle revue historique de droit français et étranger*, XII (1888), 248 ff., 311 ff.; Laurent, *Histoire du droit des gens*, X (1865), 428.

7. Nussbaum, *op. cit.*

8. On this see Bittner, *op. cit.*

9. Boyer, *Recherches historiques sur la Résolution des contrats* (thesis, Toulouse, 1924), 224, 240. An able study.

10. "Juramentum contra utilitatem ecclesiasticam non tenet." *Decretales* lib. II c. 27 [Innocent III]; see also *Liber Sextus* II, tit. XL c. 1.

11. Urban VI in 1382, *Magnum Bullarium Romanum*, III (1850), 584.

12. "Juramenta illicita laudabiliter solventur, damnabiliter observantur" (Vincent de Beauvais, 1190–1264, relying on earlier authorities). Cf. Hrabar, "Esquisse d'une histoire littéraire du droit international au moyen âge du IV^e au XIII^e siècle," *Revue du droit int.*, XVIII (Paris, 1936), 432.

13. De Morgan, *Histoire du peuple arménien* (1919), 189 f.

14. De Taube, "Etude sur le développement historique du droit international dans l'Europe orientale," *Recueil des cours*, XI (1926), 438.

15. *Infra*, p. 63.

16. The grant is controversial. We follow Foreville, *L'Eglise et la royauté en Angleterre sous Henri II* (1943), 83.

17. See *infra*, p. 71.

18. See the interesting study by Bridrey, *La Condition juridique des croisés* (1910)—especially p. 127, on the resulting conflicts with the secular power; also *Cambridge Medieval History*, V, 322.

19. Heyd, *Histoire du commerce du Levant au moyen âge*, 2nd ed., tr. from the German by Reynaud, I (1923), 386, a work of outstanding value; Schaube, *Handelsgeschichte der romanischen Völker* (1906), 146; Depping, *Histoire du commerce entre le Levant et l'Europe*, II (1830), ch. X. The prohibition referred to in the text was decreed especially by the Third Lateran Council, Decr. XXIV; Mansi, *op. cit.*, (n. 3), XXII (1769), 234.

20. Cf. Heyd and Depping; also Cappello, "Les Consulats et les bailages de Venise," *Rev. dr. int.*, XXIX (1897), 168.

21. De la Muela, "Ensayo de un guión para la investigación del derecho internacional en la edad media española," *Revista española de derecho internacional*, II (1950), 921, 933. See also *infra*, p. 55.

22. Nys, *Origines*, 285.

23. Bryce, *The Holy Roman Empire* (4th ed., 1923), 182.

24. *Ibid.*, 265, n. 10.

25. E.g., by Alfonso II of Castile (1072–1109) and Alfonso III of Asturias (866–910). See De la Muela, *loc. cit.* Spain never considered herself as a part of the medieval Empire—cf. A. M. Castro, *España en su historia* (1948), 26.

26. H. Mitteis, *Der Staat des hohen Mittelalters* (3rd ed., 1948), a most interesting study. Cf. also his *Lehnrecht und Staatsgewalt* (1933).

27. The position of the Church in feudal law has been ably examined by K. Jordan, "Das Eindringen des Lehnswesens in das Leben der römischen Kurie," *Zeitschrift für Urkundenforschung*, XXII (1932), 13. Cf. also Calmette, *La Société féodale* (1923), 256.

SEEDS OF INTERNATIONAL LAW

28. Venice became legally independent from Byzantium in 1204 after enjoying actual independence for about two centuries.

29. *Infra*, p. 54.

30. *Infra*, p. 55. Medieval German cities, too, acted widely like participants in international law. Gierke, *Das deutsche Genossenschaftsrecht*, II (1873), 720 ff.

31. Hence the problem, which came more to the fore in the post-medieval period, was already discussed by medieval writers. See Garcia Arias, *Historia del principio de la libertad de las mares* (1946), 20 ff. However, one can hardly agree with the opinion of Valéry, "Pope Alexandre III et la liberté des mers," *Rev. gén. dr. int. public*, XIV (1907), 240, that Alexander III in his brief of 1169 had declared himself in favor of the freedom of the seas.

32. Dumont, *Corps universel diplomatique du droit des gens*, II, 92. Cf. also Churchill, *The Hinge of Fate (The Second World War)*, Vol. IV, 1950, 801; Triepel, *Die Hegemonie* (1938), 151. The treaty was preceded in 1353 by a semi-commercial agreement between England and some Portuguese maritime cities. Dumont, *op. cit.*, I (3), 286.

33. For instances see Schwarzenberger, "International Law in Early English Practice," *Brit. Yr. Bk. Int. Law*, XXV (1948), 74; De la Muela, "Ensayo de un guión, etc.," *Revista española de derecho internacional*, II (1950), 943. Remarkably, in the case of the Anglo-Portuguese treaty of 1373 extradition was limited to persons sentenced for crimes of lese majesty.

34. *Supra*, p. 2.

35. Lutteroth, *Der Geisel im Rechtsleben* (1922), 194; Phillimore, *Commentaries upon International Law* (3rd ed., 1887), II, 82; Wild, *Sanctions and Treaty Enforcement* (1934).

36. See, e.g., Schwarzenberger, *op. cit.*, 89. Treaty guarantee by foreign powers belongs to a later period (*infra*, p. 115).

37. De Taube, "Les Origines de l'arbitrage international: antiquité et moyen âge," *Recueil des cours*, XLII (1932), 5; Novakovitch, *Les Compromis et les arbitrages internationaux du XII^e au XV^e siècle* (1905); Contuzzi, "Arbitrati internazionali," *Digesto italiano*, IV, 1 (1896), 311. Frey, *Das öffentlichrechtliche Schiedsgericht in Oberitalien im XII. und XIII. Jahrhundert* (1928), offers ample information not confined to the Italian situation, especially in regard to the role of the Church in public arbitration.

38. F. G. von Bunge, *Liv-, est- und kurländisches Urkundenbuch*, II (1855), 359.

39. Under the treaty of 1343, the arbitrators were appointed *ad arbitrandum, laudandum, concordandum, seu justitia vel amore*. Eventually the Archbishop of Lund had to act as super-arbitrator (von Bunge, *op. cit.*, 57).

40. Sereni, *The Italian Conception of International Law* (1934), 38.

41. Sereni, *op. cit.*, 37; Schwarzenberger, *op. cit.*, 83.

42. Erich Schumann, *Die Repressalie* (1927 [bibl.*]); De Mas Latrie, *Du droit de marque ou droit de représailles au moyen âge*, new ed., 1875; Nys, *Le Droit de la guerre et les précurseurs de Grotius* (1882), 37; Cassandro, *Le Rappresaglie e il fallimento a Venezia nei secoli XIII^o-XVI^o* (1938); Dareste, *Nouvelles études d'histoire du droit* (1902), 38 ff. Further references in Huvelin, *L'Histoire du droit commercial* (1905), 41.

43. E. S. Colbert, *Retaliation in International Law* (1948), 14.

44. Cassandro, *op. cit.*, 7 ff.; Sereni, *op. cit.*, 48.

45. This subject, important also in present international law, has been widely discussed. On the historical aspects see Spiegel, "Origin and Development of Denial of Justice," *Am. Journ. Int. Law*, XXXII (1938), 56.

46. Nys, *Origines*, 68, asserts that there existed among Hanseatic towns an agreement reciprocally to enforce judgments of their courts. This would have been indeed an excellent antidote to reprisals, but Nys's statement seems to be erroneous.

47. *Infra*, p. 69.

48. Cuttino, *English Diplomatic Administration, 1259-1339* (1940), 89 f.; Schwarzenberger, *op. cit.*, 60.

49. Nys, *Origines*, 295; Schaube, "Zur Entstehung der ständigen Gesandtschaften," in *Mitteilungen des Institutes für österreichische Geschichtsforschung*, X (1889), 509, criticizing Krauske, *Die Entwicklung der ständigen Diplomatie*, etc. [Schmoller's *Staats- und sozialwissenschaftliche Forschungen*, No. 22 (1885)]. Despite a few mistakes, Krauske's study is of considerable value. Cf. furthermore Adair, *The Exterritoriality of Ambassadors in the 16th and 17th Centuries* (1929), 7. Papal envoys are outside the scope of the present inquiry. They were entirely different in function from envoys in the international field. See, e.g., Nys, *Origines*, 361.

50. E.g., Ward, *An Enquiry into . . . the Law of Nations in Europe*, I, 242; Laurent, *Histoire du droit des gens*, X (1865), 216; Walker, *A History of the Law of Nations* (1899), 122; Gurlt, *Geschichte der Chirurgie* (1898), I, 641.

51. Cf. *supra*, p. 8. On the first traces of betterment toward the end of the Middle Ages, *infra*, p. 69.

52. Wauthoz, *Les Ambulances et les ambulanciers à travers les siècles* (1908?), 55; Tenison, *A Short History of the Order of St. John of Jerusalem* (1922).

53. Lüder, "Landkriegsrecht im Besonderen," in Holtzendorff's *Handbuch des*

Völkerrechts, IV (1889), 423, 489; Bluntschli, *Das Beuterecht im Krieg* (1878), 28; Nys, *Origines*, 254.

54. Nys, *Origines*, 190; Walker, *op. cit.*, 129; Ward, *op. cit.*, II, 155; "Chivalry" in *Ency. Soc. Sc.*, with further references.

55. Though even this must be taken *cum grano salis*. Laurent, *Histoire du droit des gens*, X (1865), 567.

56. Maurel, *De la déclaration de guerre* (thesis, Toulouse, 1907). In later times the rule was more or less abandoned: cf. Sir J. F. Maurice, *Hostilities Without Declaration of War from 1700 to 1870* (1883—an official English paper).

57. Du Payrat, *Le Prisonnier de guerre dans la guerre continentale* (thesis, Paris, 1910), 389. Regarding the amount of ransom, see W. E. Hall, *Treatise on International Law*, 7th ed. (by Higgins, 1917), 433, and Ward, *op. cit.*, I, 304 ff.

58. Nys, *Origines*, 181; Schwarzenberger, *op. cit.*, 84. The instances given by De Taube in *Recueil des cours*, XI, 389 (regarding a duel by the Byzantine Emperor Manuel Comnenos), and Vesnitch in *Rev. dr. int.*, XXVIII (1896), 418, seem to be apocryphal. Chaladon, *Les Comnènes* (2 vols., 1912), knows nothing of that duel. The "duel by champions" as a substitute for war is a familiar topic in saga and ethnology. Turney-High, *Primitive War: Its Practice and Concepts* (1949), 72.

MERCANTILE AND MARITIME LAW

59. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930), 42, and "Maritime Law," in *Ency. Soc. Sc.*; Holdsworth, *A History of English Law*, V (1924), 78; Kulsrud, *Maritime Neutrality to 1780* (1936), 113.

60. Text in Sanborn, *op. cit.*, 327.

61. xi, 3, 2.

62. Stadtmüller, *Geschichte des Völkerrechts* (1951), 70, asserts that in the Middle Ages "under the supremacy of natural-law thought" foreigners nowhere lacked legal protection and were generally treated as *hospites regis*. There is no foundation for such a statement.

63. Sandborn, *op. cit.*, 364, 374, 378.

64. Sanborn, *op. cit.*, chap. v; Holdsworth, *op. cit.*, 103; Pollock and Maitland, *The History of English Law* (2nd ed., 1923), I, 467.

65. Sir John Davies in 1636. See Holdsworth, *op. cit.*, 62 n.

66. *Monumenta Germaniae, Legum Sectio IV*, Const. II, n. 25, c. 9.

67. The standard work on the subject is Huvelin, *Essai historique sur le droit des marchés et des foires* (1897), especially chaps. ix, xv–xvii. See further *Ency. Soc. Sc.*, "Fairs" [bibl.*]; Sanborn, *op. cit.*, *passim*.

68. L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 169.

69. Sanborn, *op. cit.*, 63 ff., with references.

70. Ashburner, *The Rhodian Sea Law* (1909).

71. Jorda, *Consulat des Meeres als Ursprung und Grundlage des Neutralitätsrechts* (thesis, Hamburg, 1932); Nys, *Le Droit des gens et les anciens jurisconsultes espagnols* (1914), 125; Gardiner, "Belligerent Rights on the High Seas During the 14th Century," *Law Quarterly Review* (1932), 538. The writer has been unable to verify Nys's statement, p. 137, regarding Chief Justice Marshall's laudatory remarks on the *Consolato*.

72. *Neutrality: Its History, Economics and Law*, ed. Jessup, Vol. I, by Jessup and Deák, *The Origins* (1935), 149.

73. Stiel, *Der Tatbestand der Piraterie* (1905), 44; Jeannel, *La Piraterie* (thesis, Paris, 1903), 27; De Mas Latric, *Traité de paix et de commerce avec les Arabes de*

l'Afrique septentrionale (1866), I, 233 ("Piraterie des chrétiens"); *Ency. Soc. Sc.*, "Piracy."

The assertion often encountered that "pirates were early considered enemies of the human race and would be dealt with as such" is of questionable validity, at least in the legal field. Its basis is apparently Cicero, *De Officiis*, III, 29; but there it is merely said that promises and oaths to pirates need not be kept. Of course, murder by a pirate would be punished like any other murder.

74. Numerous references are found in Pradier-Fodéré, *Traité de droit international public*, V (1891), n. 2313, and Vedovato, *L'Ordinamento capitulare in Oriente nei privilegi Toscani dei secoli XII-XV* (1946), 96. An important instance is the Authentica "Navigia" of Emperor Frederick II, decreed in 1220.

75. Kretschmayr, *Geschichte von Venedig*, I (1905), 170. Among Venice's treaties with the Western Emperors the *Pactum Lotharii* (840), far exceeding the commercial sphere, was outstanding (*ibid.*, 94).

76. Rapisardi-Mirabelli, *Storia dei trattati e delle relazioni internazionali* (2nd ed., 1945), No. 19; Sereni, *The Italian Conception of International Law* (1943), 12; Jos. Kohler, *Handelsverträge zwischen Genua und Narbonne im 12^{ten} und 13^{ten} Jahrhundert* (1904).

77. Rapisardi-Mirabelli, *op. cit.*, 127.

78. On Anglo-Portuguese treaties of the period, *supra*, p. 24.

79. *Infra*, p. 127.

80. Dumont, *Corps universel diplomatique du droit des gens*, III, 2, 336.

81. Rapisardi-Mirabelli, *op. cit.*, 128.

82. Nussbaum, *Money in the Law, National and International* (1950), 503, 504.

83. Cf. De Nolde, "La Clause de la nation la plus favorisée et les tarifs préférentiels," in *Recueil des cours*, XXXIX (1932), 5, 24; Lapradelle-Niboyet, *Répertoire du droit international*, No. 468, "La Clause de la nation la plus favorisée," No. 6; both with references; Vedovato, *op. cit.*, 83.

84. The Anglo-Breton convention of 1486 that De Nolde mentions (*op. cit.*, 25) is not an exception as he claims.

85. Vedovato, *op. cit.*, 88, n. 46; a treaty instance in Rymer, *Foedera*, etc., XI, 569 ("alliance perpetual" between England and Castile, 1466).

86. E. G. Nash, *The Hansa: Its History and Romance* (1929); J. A. Williamson, *Maritime Enterprise, 1486-1558* (1913), *passim*; *Ency. Soc. Sc.*, "Hanseatic League" [bibl.*]; Sanborn, *Origins of Early English . . . Law*, 381, 386, and *passim*; Sartorius von Waltershausen, *Urkundliche Geschichte des Ursprungs der Deutschen Hansa* (2 vols., 1830); Rehme, "Geschichte des Handelsrechts," in *Ehrenbergs Handbuch des gesamten Handelsrechts*, I (1913), 136. Daenell, *Die Blütezeit der Deutschen Hansa* (2 vols., 1906, 1916), probably the most important work on the history of the League, offers very little information on the legal aspects. Mention may also be made of Reinold Kuricke, "Jus maritimum hanseaticum," in Johann G. Heineccius, *Scriptorum de jure nautico et maritimo fasciculus* (1740), 637 ff.

87. On this see *infra*, p. 58.

87a. *Infra*, p. 41.

88. Text in Dumont, *op. cit.*, III (1), p. 3.

89. Sanborn, *op. cit.*, 387. Text in Rymer, *Foedera*, IX, 793.

of Weckmann, *El Pensamiento político medieval y las bases para un nuevo derecho internacional* (Mexico, 1950).

95. C. N. S. Woolf, *Bartolus of Sassoferrato* (1913); Sereni, *op. cit. supra* n. 40, at 58. Van de Kamp, *Bartolus de Saxoferrato* (Amsterdam, 1936), an able study of the life and influence of Bartolus, is little concerned with matters pertinent to our inquiry.

96. For references see Nussbaum, *Principles of Private International Law* (1943), 10, n. 1.

97. This subject has been admirably treated by E. M. Meijers, "L'Histoire des principes fondamentaux du droit international privé à partir du moyen âge," *Recueil des cours*, XL (1934), 549. The religious and unilateral conception of the "capitulations" was different (*supra*, p. 53).

98. C. L. Lange, *Histoire de l'internationalisme—I: Jusqu'à la paix de Westphalie* (1919 [bibl.*]), 90; Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung* (1917), 101; Ledermann, *Les Précurseurs de l'organisation internationale* (1945).

99. E. H. Meyer, *Staats- und völkerrechtliche Ideen von Peter Dubois* (1908); Power, "Pierre du Bois," in Hearnshaw, ed., *Social and Political Ideas of Some Great Medieval Thinkers* (1923), 139; Knight, "A mediaeval pacifist—Pierre du Bois," in *Transactions of the Grotius Society*, IX (1924), 1. Pierre Dubois's *De Recuperatione terre sancte* was edited, with an excellent concise Introduction and valuable annotations by Langlois (1891).

100. Lange, *op. cit.*, 106; Ter Meulen, *op. cit.*, 108; Ledermann, *op. cit.*, 58; Schwitzky, *Der europäische Fürstenbund Georgs von Podebrad* (1907, with text of the project); Markgraf, "Ueber Georg von Poděbrads Project eines christlichen Fürstenbundes," in *Historische Zeitschrift*, XXI (1869), 257.

101. Ter Meulen, *op. cit.*, 138; *Cambridge Modern History*, I, 489. The text of the treaty in Dumont, *Corps universel diplomatique du droit des gens*, IV, 266.

102. For a fuller account, consult the works cited in note 98.

CHAPTER III. THE MIDDLE AGES—EAST

THE EASTERN ROMAN EMPIRE

1. De Taube, "Etude sur le développement historique du droit international dans l'Europe orientale," *Recueil des cours*, XI (1926), 345; and "L'Apport de Byzance au développement du droit international occidental," *ibid.*, LXVII (1939), 137 [bibl.*]; Vasiliev, *History of the Byzantine Empire* (2nd English ed., rev., 1952); Diehl, *History of the Byzantine Empire* (transl. from the French, 1945); Bréhier, *Les Institutions de l'Empire byzantin* (1949), Book 3, chap. iii.

2. From 536, when Justinian's general Belisarius occupied Rome.

3. The above discussion does not apply to the Latin emperors (1204–1261).

4. The Byzantine Emperor even claimed a universal prerogative for the coining of gold. Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2nd ed., 1926), 238; Trimbom, *Weltwährungsgedanke* (1931), 15.

5. Vernadsky, *Ancient Russia* (1943), 291.

6. Dig. 1, 7, 15.

7. *Infra*, pp. 49, 57.

8. Majid Khadduri, *The Law of War and Peace in Islam* (1941), 96.

9. See, e.g., Depping, *Histoire du commerce entre le Levant et l'Europe*, I (1830), 210.

10. On this, see the learned study of Vismara, *Bisancio e l'Islam per la storia dei trattati*, etc. (1950), especially pp. 35, 86. Cf. also Nys, *Etudes*, I, 46.

11. For a detailed and careful analysis of the treaties see Güterbock, *Byzanz und Persien in ihren diplomatischen und völkerrechtlichen Beziehungen im Zeitalter Justinians* (1906); cf. also Paradisi, *Storia del diritto internazionale* (1940), 203. The otherwise outstanding discussion in De Taube's "L'Apport de Byzance, etc." is somewhat defective in this particular matter.

RUSSIA

12. De Taube, "Etude sur le développement historique du droit, etc., *Recueil des cours*, XI, 398, and "L'Apport de Byzance, etc.," *ibid.*, LXVII, 271, 282; Vernadsky, *Kievan Russia* (1948), 26, 36, 149. The main source for the text of the treaty, the "Book of Annals," has been translated by S. H. Cross, "The Russian Primary Chronicle," *Harvard Studies and Notes in Philology and Literature*, XII (1930), 149, 159.

13. Ostrogorski, *Geschichte des byzantinischen Staates* (1940), 130 n. 4.

13a. Strémoukhoff, "Moscow the Third Rome: Sources of the Doctrine," *Speculum*, XXVIII (1953), 84.

14. On the gradual ascent of Moscow by way of war, and on intra-Russian treaties, see Fleischhacker, *Die staats- und völkerrechtlichen Grundlagen der moskauischen Aussenpolitik, 14.-17. Jahrhundert* (1938). Regarding the Russo-Hanseatic treaties, see *infra*, p. 59.

15. Alexandre Eck, *Le Moyen Age russe* (1938), 66, 71; De Taube, "Les Origines de l'arbitrage international," *Recueil des cours*, XLII (1932), 69, and "Etude sur le développement, etc.," *ibid.*, XI (1926), 398; Novakovitch, *Les Compromis et les arbitrages internationaux du XII^e au XV^e siècle* (1905).

16. De Taube, "Les Origines, etc.," *Recueil des cours*, XLI, 70, refers to a project for a multipartite arbitral agreement conceived in 1203 by Roman, Prince of Galicia. Convincingly, he sees Western influence in the project.

17. De Taube's estimate, too, is greatly reserved. He gives, in "Les Origines, etc.," *Recueil des cours*, XLII (1932), 72, an instance of an utterly brutal and vicious frustration of an arbitral proceeding between princes of Tver.

ISLAM

18. De Taube, "Etude sur le développement, etc.," *Recueil des cours*, XI (1926), 380; Bentwich, *The Religious Foundations of Internationalism* (1933), 159; Nys, *Etudes*, I, 46; von Tarnauw, *Das moslemische Recht aus den Quellen dargestellt* (1855); Pütter, *Beiträge zur Völkerrechtsgeschichte und -wissenschaft* (1843), 49; *Dictionary of Islam*, *passim*. Ahmud Rechid, "L'Islam et le droit des gens," *Recueil des cours*, LX (1939), 375, and Amanazi, *L'Islam et le droit international* (thesis, Paris, 1920) are not very helpful. Rechid's essay, insufficiently documented, tries to draw an ideal picture of Islamic law. An informative background study is Milliet, "La Conception de l'état et l'ordre légal dans l'Islam," *Recueil des cours*, LXXV (1949), 597.

19. There are in Western languages excellent studies on this subject: Majid Khadduri (Bagdad), *The Law of War and Peace in Islam* (1941) [bibl.*], cover-

ing the first four centuries of the Islamic era; Haneberg, *Das muslimische Kriegsrecht* (1891), also essay in *Abhandlungen der Philosophisch-Historischen Classe der Kgl. Bayrischen Akademie der Wissenschaften*, XII, Part 2, 217 ff., with text of the *Vikayah*, an authoritative treatise on the law of war by Mahmud el Mahbâb [1280]. See also note 20.

20. Baillie, "Of Jihad in Mohammedan Law," *Royal Asiatic Society Journal*, V (1870); Jurji, "The Islamic Theory of War," *Moslem World*, XXX (1940), 322. Jurji, relying on the eminent Moslem writer on public law Al-Mawardi (d. 1058), discounts the significance of the jihad doctrine.

21. An early work of this type, the *Radd-al-Muhtar* (Answer to the Perplexed) by Hasan as-Saihani (749-804), has been analyzed by Hatschek, *Der Musta'min* (1919), 25. On Mahmud el Mahbâb, see note 19.

22. Majid Khadduri, *op. cit.*, 25 ff.

23. The text is given by Thomas Walker, *History of the Law of Nations* (1899), 75.

24. On the treaty between Harun al-Rashid and Emperor Nikophoros, *supra*, p. 47.

25. Arabian ransoming customs, too, influenced Christian practices in Spain (De la Muela, "Ensayo de un guión para la investigación del derecho internacional en la edad media española," *Revista española de derecho internacional*, II [1950], 934).

26. In addition to the writings cited in note 18, see Heffening, *Das islamitische Fremdenrecht* (1925), and Belim, "Fetoua relatif à la condition des Zimmis," *Journal asiatique*, 4th ser., XVIII (1852), a translation of a lengthy *futwa* (formal legal opinion) by Ibn Naqqach of Cairo (14th century).

27. On the legal effects of *amân*, cf. Hartmann, "Die islamisch-fränkischen Staatsverträge," in *Zeitschrift für Politik*, XI (1919), 55, with translated extracts from the authoritative writers Abu Jussuf (eighth century) and Schafi'i (ninth century).

28. As in Constantinople (*supra*, p. 47), and from 1427 to 1431 in Salonika, Heyd, *Histoire du commerce du Levant au moyen âge*, II, 281, but also in Canton and other Chinese ports, *ibid.*, 246; Nazim Souza, *The Capitulatory Regime in Turkey* (1933), 46. See also *infra*, n. 42.

29. On this topic, too, the studies cited in notes 18 and 19 and especially Haneberg's essay, are helpful.

30. Koran, X, 9, 4.

31. Koran, XVI, 91. See also Khadduri, *The Law of War and Peace in Islam*, 82, with further references.

32. Haneberg, *op. cit.*, 253.

33. Haneberg, *loc. cit.*

34. Lane-Poole, *Saladin and the Fall of the Kingdom of Jerusalem* (1926), 307 (cf. 147, 233). See also Newhall, *The Crusades* (1927), 54, and Thomas A. Walker, *History of the Law of Nations* (1899), 125.

MEETING OF EAST AND WEST—CONSULS

35. E. Kantorowicz, *Frederick the Second* (1932)—transl. of *Kaiser Friedrich der Zweite* (1928)—p. 187. Remnants of the treaty in *Monumenta Germaniae Historica, Legum Section IV*, tom. II, 160.

36. Regarding the somewhat uncertain earlier agreements between Pisa and the Almoravides rulers of Morocco and Algeria, see De Mas Latrie, *Traité de paix et*

de commerce avec les Arabes de l'Afrique septentrionale (1866), I, 35, 39, and II, 22.

37. Lane-Poole, *A History of Egypt in the Middle Ages* (2nd ed., 1913), 218.

38. There is copious literature on this subject. In addition to the works of Heyd, Schaube, Depping, Vedovato [bibl.*], Sanborn (cited in nn. 19, 74, and 59 to chap. ii), and Souza (n. 28, preceding), cf. Ravndal, *The Origins of the Capitulations and of the Consular Institution*, 67 Cong., 1 Sess., Doc. No. 34 (1921); Overbeck, "Die Kapitulationen im Osmanenreich," *Zeitschrift für Völkerrecht*, 1910, Supp. III. For the text of the capitulations and valuable comment see De Mas Latrie, *op. cit.*, II and important *Supplément et tables* (1872).

39. Outstanding examples are the Venetian-Egyptian treaties of 1238—quoted in Hartmann, *op. cit.*, (n. 27), 36 ff.—and 1355 (De Mas Latrie, *Traité*s, etc., "Supplément," 88).

40. Vedovato, *L'Ordinato capitulare*, etc., 79.

41. A striking instance is the later development of consular "protection" of foreigners and natives. *Infra*, pp. 194, 208.

42. A commercial treaty concluded in 1231 by the Emperor Frederick II as ruler of Sicily, with the Sultan of Tunis, providing for the appointment of consuls, was based on reciprocity; but this was no typical capitulation. Schaube, *Handelsgeschichte der romanischen Völker*, 302. Regarding Moslem settlements in non-Moslem countries, see n. 28.

43. Holldack, "Kilikische Handelsprivilegien der Republiken Genua und Venedig," *Zeitschrift für Völkerrecht*, II (1908), 400. See also note 44.

44. Cappello, "Les Consuls et les bailages de Venise," *Rev. dr. int.*, XXIX (1897), 153 ff.; Kretschmayer, *Geschichte von Venedig*, II, 24, 119 (Armenia).

45. Schaube, *op. cit.*, 136; Vedovato, *op. cit.*, 86.

46. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930), 139, 148, and *passim*; Ravndal, *supra* n. 38; Salles, *L'Institution des consuls: Son origine, son développement au moyen âge chez les différents peuples* (1898); Morel, *Les Jurisdictions commerciales au moyen âge* (1897), 81; Lippmann, *Konsularjurisdiktion im Orient* (1898), 5; Contuzzi, *Trattato teorico-prattico di diritto consolare*, I (1910), 23; Nys, *Droit international*, II (1912), 452. Cf. also Schaube, "La Proxénie au moyen âge," in *Rev. dr. int.*, XXVIII (1896), 525.

47. Stuart, "Le Droit et la pratiques diplomatiques et consulaires," *Recueil des cours*, XLVIII (1934), 493; De Laigue, "L'Institution consulaire: Son passé historique," *Revue d'histoire diplomatique*, III, Supp. (1890), 546. The royal patent for Lorenzo Strozzi is found in Rymer, *Foedera, conventiones, etc.*, V, 164. In 1408 Henry IV had authorized the English merchants in Scandinavia to elect consuls there (Sanborn, *op. cit.*, 389).

48. K. L. Goetz, *Deutsch-Russische Handelsverträge des Mittelalters* (1916) and *Deutsch-Russische Handelsgeschichte des Mittelalters* (1922); De Taube in *Recueil des cours*, XI, 460, 592 [bibl.*].

49. Text in Goetz, *Deutsch-Russische Handelsverträge*, 78.

50. More on this in Goetz, *Deutsch-Russische Handelsgeschichte*, 338 ff.

CHAPTER IV. MODERN TIMES, UNTIL THE THIRTY YEARS' WAR

BASIC FACTORS, WEST AND EAST

1. Regarding the Reformation, see Boegner, "L'Influence de la Réforme sur le développement du droit international," *Recueil des Cours*, VI (1925), 245.

2. Oechli, *History of Switzerland, 1499-1914* (1922), 1, 14; Guggenbühl, *Geschichte der schweizerischen Eidgenossenschaft*, I (1947), 356; Bluntschli, *Geschichte des schweizerischen Bundesrechts von den ersten ewigen Bünden bis auf die Gegenwart*, I (1849), 230.

3. But not before 1499. The fact is relevant to the trial, held in 1474 at Breisach, of the Burgundian bailiff Hagenbach by a tribunal formed by Swiss and other cities of the Upper Rhine area together with the Duke of Austria. Schwarzenberger, *International Law* (2nd ed., 1949), 308, considers this as an international war crime trial, predecessor of the trials following World War II. Yet the trial was not international; nor was it concerned with war crimes.

4. Gorgé, *La Neutralité helvétique* (1947), 39; Bonjour, *Geschichte der schweizerischen Neutralität* (1946); a survey in Straessle, *Die Entwicklung der schweizerischen Neutralität* (thesis, Fribourg, 1951).

5. *Las Siete Partidas del Rey Don Alfonso el Sabio*, ed. by the Real Academia de la historia (3 vols., Madrid, 1807) "Prologo." The *Siete Partidas* were given (subsidiary) legal force in 1348.

6. Von Brauchitsch, *Geschichte des spanischen Rechts* (1852), 89.

7. Van der Linden, "Intervention pontificale dans la délimitation des domaines coloniaux et maritimes," *Rev. dr. int.*, XXXIV (1939), 519; Nys, *Etudes*, I, 193; and, on broader grounds, Scheuner, "Zur Geschichte der Kolonialfrage im Völkerrecht," *Zeitschrift für Völkerrecht*, XXII (1938), 442. The texts of the bull and of the treaties are found in Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies*, I (1917), Nos. 7, 9, and 16. Concerning Alexander VI, it will be sufficient to refer to the *Encyclopædia Britannica* ("Alexander") or the *Catholic Encyclopedia* ("Alexander") [bibl.*].

Recently Staedler has subjected the bull of 1493 and the subsequent treaties to a searching analysis in "Die Westindischen Investituredicte Alexanders VI," *Zeitschrift für Internationales Recht*, L (1935), 315, and "Die Westindische Raya von 1493 und ihr völkerrechtliches Schicksal," *Zeitschrift für Völkerrecht*, XXII (1938), 165, and "Zur Vorgeschichte der Raya von 1493," *ibid.*, XXV (1941), 57, and "Hugo Grotius über die donatio Alexandri von 1493 und der Metellusbericht," *ibid.*, XXV (1941), 257.

8. *Supra*, p. 19.

9. Pelissié du Rausas, *Le Régime des capitulations dans l'empire Ottoman* (2 vols., 2nd ed., 1911); Anonymous, *Le Régime des capitulations* (Paris, 1898), with text of the 1535 treaty and of the later Franco-Ottoman capitulations; Lippmann, *Die Konsularjurisdiction im Orient* (1898—greatly informative); and the writings of Ravndal and others cited in note 38 preceding. The text of the 1535 convention is also given by Ravndal, 94.

10. The Popes themselves, at times, it is true, did not feel much inhibition in this respect. Cf. Pfeffermann, *Die Zusammenarbeit der Renaissancepäpste mit den Türken* (1946), discussing especially Alexander VI's attempts to ally himself with Sultan Bajazet. As late as 1609 the Spanish Jesuit Carthagena, writing at the behest of Pope Paul V, insisted in his *Propugnaculum Catholicum de jure belli*

Romani Pontificis adversum Ecclesiae jura violentes that the Popes may wage wars of their own in defense of ecclesiastical rights and employ non-Christian soldiers for this purpose. Nys, *Le Droit de la guerre et les précurseurs de Grotius* (1882), 186; Walker, *History of the Law of Nations* (1899), 276.

11. Lavissee and Rambaud, *Histoire générale du IV^e siècle jusqu'à nos jours*, IV (1894), 737.

12. On the complicated history of the law of the Holy Places, see F. von Verdy du Vernois, *Die Frage der Heiligen Stätten Palästinas* (1901).

13. Zinkeisen, *Geschichte des Osmanischen Reichs in Europa*, III (1855), 417; Hakluyt, *Principal Navigations, Voyages, etc.* (1599), II, Part 1, pp. 136 ff. Historians have paid little attention to these events.

14. Morse, *The International Relations of the Chinese Empire*, I (1910), 43; Scheuner, *op. cit.*, 442.

15. See, e.g., Morse and MacNair, *Far Eastern International Relations* (1931), 25.

16. Menzel, "Spinoza und das Völkerrecht," *Zeitschrift für Völkerrecht*, II (1908), 17, with the text of the 1611 letters of agreement, which are couched in rather vague phrases, on 25 ff.

STATE PRACTICE

17. J. A. Williamson, *The Age of Drake* (1946) and *Hawkins of Plymouth* (1949). See also William C. H. Wood, *Elizabethan Sea-Dogs* (1918).

18. Keller-Lissitzyn-Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (1908).

19. Mignet, *Rivalité de François I^{er} et de Charles-Quint*, II (1875), 204.

20. *Magnum Bullarium Romanum*, VI (1860), 201.

21. See n. 120, following.

22. The Anglo-Spanish treaty of 1515 cited in Dumont, *Corps universel diplomatique*, IV (1), 220, is an instance. It tried to eliminate disturbances of a commercial treaty of 1506 regarding Anglo-Flemish commerce.

23. Dumont, *op. cit.*, V, 831; Amé, *Etude sur les tarifs de douane et sur les traités de commerce*, I (1876), 6.

24. 28 Hen. VIII, c. 15; J. F. Stephen, *A History of the Criminal Law of England*, II (1883), 366; J. A. Williamson, *Maritime Enterprise, 1485-1558* (1913), 366.

25. Ortolan, *Règles internationales et diplomatie de la mer*, I (4th ed., 1864), 210.

26. *De jure belli*, I, Chap. 25 (English transl., p. 124). See, however, *ibid.*, I, Chap. 4 (p. 38) on the vacillating attitude of Alciatus.

27. Williamson, *Maritime Enterprise*, 355.

28. Van der Molen, *Alberico Gentili* (1937), 49.

29. Krauske, *Die Entwicklung der ständigen Diplomatie* (1885), 98. England had ambassadors at the Imperial Court even earlier.

30. Bluntschli, *Das Beuterecht im Kriege* (1878), 42, mentions in this connection a Swiss ordinance (*Sempacherbrief*) of 1399. Henry V of England issued rather humane "General Orders" to the army when he invaded France in 1415; similar Orders seem to have been promulgated in 1386 by Richard II. (Montague Bernard, "The Growth of Laws and Usages of War," *Oxford Essays* [1856], 88, 98.)

31. Described (*Reuterbestallung* and *Fussknechtsbestallung*) in Bluntschli, *op. cit.*, 43. Regarding Coligny's *Ordonnances* (for the infantry) of 1548, cf. Gardot,

"Le Droit de la guerre dans l'œuvre des capitaines français du XVI siècle," *Recueil des cours*, LXXII (1948), 421, 470.

32. Gardot, *op. cit.*, 485.

33. Kleen, *Lois et usages de la neutralité d'après le droit international conventionnel et coutumier des états civilisés*, II (1900), 433; Butler and Maccoby, *Development of International Law* (1928), 308.

34. Jessup, ed., *Neutrality: Its History, Economics and Law* (1935), Vol. I (by Jessup and Deák), *The Origins*, 20; Nys, *Etudes*, II, 57.

35. Knight, "Neutrality and Neutralization in the Sixteenth Century—Liège," *Journ. Comp. Legislation and Int. Law* (1920), II 3rd series), 98.

36. Jessup, *op. cit.*, 126 ff.

37. Roscoe, *A History of the English Prize Court* (1924); Marsden, "Early Prize Jurisdiction and Prize Law in England," *Eng. Hist. Rev.*, XXIV (1909), 675, 680, and XXV (1910), 243.

38. Nys, *Le Droit international*, III (1912), 711; De Pistoye et Duverdy, *Traité des prises maritimes*, II (1859), 142.

DOCTRINAL DEVELOPMENTS

39. A comprehensive survey is presented by Garcia Arias in an appendix ("Adiciones sobre historia de la doctrina hispánica de derecho internacional") to Nussbaum, *Historia del derecho internacional* (transl. from the English, Madrid, 1950), 359 ff. Cf. also Nys, *Le Droit des gens et les anciens jurisconsultes espagnols* (1914); Regout (S.J.), *La Doctrine de la guerre juste de Saint Augustin à nos jours* (1934), 186; von Kaltenborn, *Die Vorläufer des Hugo Grotius* (1848), 124.

40. For a survey see S. Riezler, *Die literarischen Widersacher der Päpste* (1874). The Spanish "écrivains à tendance évangélique" were of little importance. Droin, *Histoire de la Réformation en Espagne*, I (1879), 33.

41. See *infra*, pp. 41, 301. The Church had early claimed power over non-Christians. Cf. Gierke, *Political Theories of the Middle Age*, n. 50; regarding Pope Innocent IV, R. W. and A. J. Carlyle, *A History of Medieval Political Theory*, V (1928), 323; Hurter, *Papst Innocenz III und seine Zeitgenossen*, III (1938), 1 ff.

42. *Infra*, p. 81; see also *supra*, p. 19.

43. *Infra*, p. 81.

44. *Infra*, p. 84.

45. Gierke, *Das deutsche Genossenschaftsrecht*, II (1873), 720 ff. See also *supra*, p. 40.

46. Regarding the Middle Ages, see Gierke, *Political Theories of the Middle Age*, 95; Catlin, *The Story of the Political Philosophers* (1939), 164. The civilians ("legists") came nearer to the concept of the State (Gierke, *op. cit.*, n. 339). But even with Grotius the idea of a State did not yet fully conform to modern notions (*infra*, n. 140).

47. See, e.g., Gierke, *op. cit.*, 194, nn. 335, 336.

48. However, Bartolus developed, with an eye to the Italian city-states, the notion of an *universitas superiorum non recognoscens*, regardless of whether the nonrecognition was *de facto* or *de jure*. (Gierke, *The Development of Political Theory*, 280, n. 14. See also *supra*, p. 40.) This idea, however, was not adopted by the theologians or the canonists.

49. *Infra*, p. 76.

50. A similar line of thought is followed by Giuliano, "Rilevi sul problema storico del diritto internazionale" in *Comunicazioni e studi*, ed. by Istituto di Diritto Internazionale (Milan), III (1950), 105.

51. An illustration may be found in an action in 1592 by the governor of the Philippines. Before beginning a war against the Sambals, he required an opinion from the Augustinian order as to whether the war would be "just." The question was answered at length affirmatively. (E. H. Blair and J. A. Robertson, eds., *The Philippine Islands, 1493-1898*, VII [1903], 14, 199.) The practical significance of this colonial occurrence is limited, however.

52. They would inquire only whether injury to an envoy or violation of a treaty might justify war, without plunging into the legal problems involved.

53. *De justitia et jure*, III, quest. 3 (not 9!), a. 3; Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts* (1949), 70. He also taught that Christian princes undoubtedly had the right to confiscate the property of infidels at will. Cf. Barcia Trelles, "Francisco de Vitoria et l'école moderne du droit international," *Recueil des cours*, XVII (1927), 170.

54. *Supra*, p. 63, *infra*, pp. 69, 92. See also Regout, *La Doctrine de la guerre juste à nos jours*, 242, on the views of the noted Spanish Dominican Bañez regarding the assassination of William the Silent.

55. On this see particularly Höffner (a Catholic theologian), *Christentum und Menschenwürde: Das Anliegen der spanischen Kolonialethik im goldenen Zeitalter* (1947). A similar view has been taken by the Spanish legal historian Hinejosa, "Los Precursores españoles de Grocio," *Anuario de historia del derecho español*, VI (1929), 220.

56. *Infra*, p. 296.

57. On Vitoria, see p. 79, *infra*; on Suárez, p. 84.

58. Covarruvias also touched upon the traditional just-war doctrine, but did not raise any new points of significance. See, e.g., Regout, *op. cit.*, 187; Garcia Arias, appendix to Nussbaum, *Historia del derecho internacional*, 401. The same is true of Domingo de Soto, who followed on the whole the teachings of Vitoria.

59. Great efforts have recently been made to exalt, from a Spanish and Catholic point of view, the merits of Fernando Vazquez de Menchaca (1512-1569), legal adviser to Philip II. See Barcia Trelles, "Fernando Vazquez de Menchaca," *Recueil des cours*, LXVII (1939), 433; Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts* (1949)—far more moderate and discerning, with numerous quotations from Menchaca; Garcia Arias, *op. cit.*, 403. Discussing the doctrine of prescription, Vazquez incidentally asserted that there can be no public or private rights over the open sea (*Controversiae illustres* [1563], II, chap. 89, § 12). The same opinion had been advanced by earlier writers opposing the claims of Venice and Genoa (*supra*, p. 23). Menchaca turned vehemently against these claims, but at the same time against similar aspirations found among the Spanish people (he uses the term *vulgus*) with regard to the ocean between Spain and her overseas possessions. These aspirations were utterly precarious, whereas the monopolies arrogated by Venice and Genoa were very real and did great damage to Spanish navigation and commerce. Hence, there is no reason to praise Menchaca with Barcia Trelles as an entirely disinterested "apostle of oceanic freedom." Basically, Menchaca distinguished between the *jus gentium primaevum*, which is to all intents and purposes the human share in the divine and immutable *jus naturale* (according to him, the *jus naturale* as a whole applies to animals also), and the mutable *jus gentium secundarium*; but *jus gentium* is understood by Menchaca in the sense of universal or nearly universal law and not of a law between states. This part of his system is not progressive; neither is it original. It was also rejected by Suárez. See Reibstein, *op. cit.*, 74; Gierke, *Deutsches Genossenschaftsrecht*, IV (1913), 281, n. 20, and 163, n. 37. Menchaca further recognized the Pope's temporal jurisdiction over the whole world for the good of the Church. We are not concerned with Menchaca's

achievements in the doctrine of public and private law, which include remarkable observations on matters of political theory.

60. This is definitely true of the French, Italian, Belgian, and Latin American literature. The same trend prevailed in Spain herself. See, Appendix II, n. 11. The statement by Brierly, *Law of Nations* (4th ed., 1949), 26, that the works of the Spaniards have been unfairly neglected, "especially in Protestant countries," is not correct. Also, the great Spanish churchmen contributing to the progress of thought on matters of warfare belong to the sixteenth and seventeenth rather than to the fifteenth and sixteenth centuries, as asserted by Brierly.

61. The main "rediscoverers" of the Spanish school were Nys, *Le Droit de la guerre et les précurseurs de Grotius* (1882) and *Le Droit des gens et les anciens jurisconsultes espagnols* (1914), and Rivier, *Note sur la littérature du droit des gens avant la publication du Jus belli ac pacis de Grotius* (1883). They had a lone predecessor in the Dutch historian Fruin, whose 1868 essay, "An Unpublished Work of Grotius," has been reprinted in *Bibliotheca Visseriana*, V (1925), 3. See *infra*, Appendix II. They all considered the Spaniards merely as forerunners of Grotius.

62. *Infra*, pp. 296 ff.

63. Camden, *The History of the Most Renowned and Victorious Princess Elizabeth, Late Queen of England*, II (1675), 255, commenting on the year 1580. The statements that possession is a necessary requisite of dominion, and that "sea and air" are common to all, "possession" thereof not being permitted by nature nor by public use and custom, are typically Roman. See *Inst.* I, § 1, and *supra*, p. 67.

64. James I, *Political Works*, ed. McIlwain (1918), 310.

65. Robert Wiseman, *The Law of Laws or the Excellence of Civil Law* (1657). See also Duck, *De usu et autoritate juris civilis Romanorum in dominiis principum christianorum* (1653). On Zouche's *Juris et judicii fecialis sive juris inter gentes et quaestiones de eadem explicatio*, see *infra*, p. 165.

66. Cf. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927). As late as 1879 Sir Robert Phillimore (*Commentaries upon International Law*, I, 32) asserted that "Roman law may be said to be the most valuable of all aids to a correct and full knowledge of international jurisprudence of which it is indeed, historically speaking, the actual basis."

67. See Gentili's remark, *infra*, p. 99.

68. Von Rauchhaupt, *Geschichte der spanischen Gesetzquellen* (1923), 105.

69. More on this in Nussbaum, *Principles of Private International Law* (1943), 231 n. 9.

70. The Dutch States-General in 1599 invoked, in addition to the "common law of nations," Roman law as basis for their blockade against Spain. Van Vollenhoven, *The Three Stages in the Evolution in the Law of Nations* (1919), 3. In 1567 the French Chancellor de L'Hôpital, rejecting the surrender of Calais to England, even invoked the Twelve Tables. Camden, *History of the Most Renowned and Victorious Princess, etc.*, II, 98. On a recent recognition by Spain of Roman law as the *jus gentium*, cf. Lauterpacht, *Private Law Sources, etc.*, 251.

71. See Nys, *Le Droit international*, I, 224 ff. ("Les Précurseurs de Grotius"), and *Le Droit de la guerre et les précurseurs de Grotius* (1882); Rivier, *Note sur la littérature du droit des gens, etc.*, 61; and von Kaltenborn, *Die Vorläufer des Hugo Grotius* (1948). Von Kaltenborn pays special attention to a group of Protestant writers—viz., the German, Johann Oldendorp (d. 1561), the Dane, Nicholas Hemming (1543–1600), and the better known Benedict Winkler, a German (d. 1648)—and (p. 168) places the Italian Albertus Bolognetus (1539–1600)

first among the other writers. The characterization of these authors as "predecessors" of Grotius can be accepted only in a very limited sense.

There were also numerous rather insignificant dissertations about the law of war and related special topics (listed by von Kaltenborn and Rivier). On the German Johann W. Neumayr von Ramsla, who in 1623 wrote about "Bündtnisse und Ligen in Kriegszeiten," see Reibstein, "Neumayr von Ramsla als Völkerrechtautor," *Zeitschr. ausl. Recht und Völkerrecht*, XIV (1951), 125.

72. For references on the history of private international law, see Nussbaum, *Principles of Private International Law* (1943), 10 n. 1.

73. Sabine, *A History of Political Theory* (rev. ed., 1950), Chaps. XVII and XX [bibl.*]; "Machiavelli" and "Bodin," *Ency. Soc. Sc.* [bibl.*].

74. *The Prince*, Chap. XVIII.

75. The inherent limitations of the concept of sovereignty of Bodin, who maintained the supremacy of God and of the law of nature over sovereigns, have been stressed by Gardot, "Jean Bodin, sa place parmi les fondateurs du droit international," in *Recueil des cours*, L (1934), 549.

76. Balch edited *The New Cyneas of Emeric Crucé* (Philadelphia, 1909), giving the full text of Crucé's pamphlet in English and French. See also Pajot, *Un Reveur de paix sous Louis XIII: Emeric Crucé, parisien* (thesis, Paris, 1924); Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung*, I (1917), 143; C. L. Lange, *Histoire de l'internationalisme jusqu'à la paix de Westphalie* (1919), 398; and Sir Geoffrey Butler, *Studies in Statecraft* (1923), 91. P. Louis-Lucas, *Un Plan de paix générale* (1909), unconvincingly tries to trace some influence of Crucé's on Grotius and other writers.

77. The title of Sully's memoirs is long-winded and pretentious: *Mémoires des sages et royales oeconomies d'estat domestiques, politiques et militaires de Henri le Grand, l'exemplaire des roys, le prince des vertues, des armes et des lois, et le père en effet de ses peuples françois, etc.*; a customary brief title is *Oeconomies royales*. See C. L. Lange, *op. cit.*, 434 (comprehensive analysis with references); Sir Geoffrey Butler, *op. cit.*, 65; Ter Meulen, *op. cit.*, 160. An extract from the memoirs is in "The Grotius Society Publications, Texts for Students of International Relations," No. 2 (1921).

FRANCISCO VITORIA

78. On Vitoria (Victoria is the Italian version of the name) see J. B. Scott, *The Spanish Origin of International Law* (1932) and *The Catholic Conception of International Law* (1934)—both highly inadequate (see Appendix II, *infra*); Albertini, *L'Œuvre de Francisco de Victoria et la doctrine canonique du droit de la guerre* (1903); Nys, Introduction to *De Indis et De jure belli relectiones* by Franciscus de Victoria (1917), in *Classics of International Law*—a study of great value; Barthélemy, "François de Vitoria," in *Les Fondateurs du droit international*, ed. by Pillet (1904), 1; Regout (S.J.), *La Doctrine de la guerre juste* (1934), 152; Baumel, *Le Droit international public, la decouverte de l'Amérique et les théories de Francisco de Vitoria* (thesis, Montpellier, 1931), in fact a eulogy; Goyau, "L'Eglise catholique et le droit des gens," *Recueil des cours*, VI (1925), 181; Barcia Trelles, "Francisco de Vitoria, etc.," *Recueil des cours*, XVII, 113; Höffner, *Christentum und Menschenwürde*, *supra* n. 55, *passim*; von der Heydte, "Franciscus de Vitoria und sein Völkerrecht," in *Zeitschrift für öffentliches Recht*, XIII (1933), 239, 264; Hentschel, "Franciscus de Vitoria und seine Stellung im Ueber-

gang vom mittelalterlichen zum neuzeitlichen Völkerrecht," *ibid.*, XVII (1937), 319. Muñoz (O.P.), *Vitoria and the Conquest of America* (Manila, 1938), is insignificant. Biographical: Getino (O.P.), *El Maestro Fray Francisco de Vitoria* (2nd ed., 1930). A great many other publications, mainly Spanish, are listed in Nussbaum, *Historia del derecho internacional*, 313 (appendix by Garcia Arias).

79. On the Classics of International Law edition of "De Indis recenter inventis" and "De jure belli Hispanorum in barbaros," in both Latin and English, see n. 78. Critically revised texts of these and other *relectiones* of Vitoria have been published with Spanish translations by Getino, under the title of *Relecciones teológicas del Maestro Fray Francisco de Vitoria*, II (1934). English translations of several of Vitoria's *Relectiones*, without the Latin originals, are found in the appendixes to Scott, *The Spanish Origin of International Law*, but they contain serious mistakes (see Appendix II, *infra*). The lecture on the law of war was translated into French by Vanderpol, *La Doctrine scholastique du droit de guerre* (1919), 243, and with a critical revision of the Latin text, by Baumel, *Les Leçons de Francisco de Vitoria sur les problèmes de la colonisation et de la guerre* (suppl. thesis, Montpellier, 1936). Cf. also Octavio, "Les Sauvages américains devant le droit," *Recueil des cours*, XXXI (1930), 181. L'Association Internationale Vitoria-Suárez, *Vitoria et Suárez* (1939), gives, under headings chosen by the editors, rearranged extracts from Vitoria's and Suárez's writings in Latin and French. Truyol Serra, *The Principles of Political and International Law in the Work of Francisco de Vitoria* (transl. from Spanish, Madrid, 1946), offers similar extracts with comments from a strictly Catholic and Spanish point of view.

80. See F. A. MacNutt, *Bartholomew de las Casas* (1909); Marcel Brion, *Bartholomé de las Casas, père des indiens* (1927); A. J. Knight, *Las Casas, "The Apostle of the Indies"* (1917); L. Hanke, *Bartholomé de las Casas* (1952). A rather unfavorable appraisal of Las Casas' achievements under "Las Casas," in the *Catholic Encyclopedia*.

81. *Supra*, p. 14. *The Institutes*, I, 2, 1, call the *jus gentium* the "law common to all men" (*jus commune omnium hominum*). In fact, *gens* refers to any group connected by blood or other natural ties. See articles on *gens* in *Thesaurus Mediae et Infimae Latinitatis*, in Forcellini, *Totius Latinitatis Lexicon*, and in similar works. The term *jus gentium* itself began to assume the exclusive meaning of "international law" only with Hobbes, *infra*, p. 146, and *gens* began to be used, vaguely, in the modern sense of a nation only with Zouche (*infra*, p. 165).

82. E.g., in "De Indis, etc.," I, § 18; III, §§ 16, 17, 18; "De jure belli," §§ 1 (6), 5, 6, 7, 9, 12, 15, 18, 19, 31, 33, 35, 41, 60, and frequently in the *Relectio* "De potestate civili" (reprinted by Getino, *op. cit.*, 169 and translated in Scott, *The Spanish Origin of International Law*, App. C.). Often he contrasts *respublica* and *princeps* (prince), e.g., "De jure belli," §§ 6, 7, 15, "De potestate civili," § 8. Where foreign relations are in point, Vitoria as a rule speaks of princes. *Civitas*, with Vitoria, ordinarily means "city": cf. "De Indis, etc.," III, § 16; "De jure belli," §§ 33, 52, 54, 56, 59. On all this see *supra*, p. 72. Regarding the significance of *civitas* in general, cf. Gierke, *The Development of Political Theory*, 259, 267.

83. The word *natio*, employed by Vitoria in his explanation of the *jus gentium*, means, like *gens*, a group of persons connected by natural ties, often a subgroup of a *gens*. See, e.g., Forcellini, *Totius Latinitatis Lexicon*, under *natio*. The modern significance of a "nation" as the whole of a state's populace appeared in the eighteenth century to be generally accepted since the French Revolution.

Reibstein, *op. cit.* (n. 53, preceding), 68, 193, is in accord with the opinion

expressed above, adding further reasons. Clementinus a Vlissingen, *De evolutione definitionis juris gentium* (1940), 52 ff., 165, seems to prefer the same opinion.

84. We shall find a definite slip of Vitoria's memory in another of his citations from the *Corpus Juris*, in Appendix II, n. 39.

85. On this see Garcia Arias's appendix to Nussbaum, *Historia del derecho internacional*, 364, 373, with ample references to Spanish literature.

86. The Sambals affair (*supra*, n. 51) might well be related to Vitoria's teachings.

87. Vitoria also passes over the question whether the divine character ascribed by him to monarchies applies to infidels ("De potestate civili," § 9).

88. See *supra*, p. 71, and n. 82.

88a. Remarkably, from the time of Philip II it was an important principle of Spanish colonial policies in the Americas to prohibit any intercourse of the colonists and natives with foreigners, under penalty of death and confiscation. See W. Roscher, *The Spanish Colonial System* (transl. Bourne, 1904) 28.

89. Catry (S.J.), "La Liberté du commerce international d'après Vitoria, Suárez et les scolastiques," *Revue générale du droit international* (1932), 193, is mainly a defense of Suárez against some Dominican criticism.

90. *Droit des gens* (1758), Bk. II, Chap. 2, §§ 24-26.

91. Vitoria followed in this respect Cardinal Cajetan (Thomas de Vio, 1469-1534). Regout (S.J.), *La Doctrine de guerre juste* (1934), 124.

92. See Scott, *The Spanish Origin of International Law* (1934), 275.

93. "De potestate civili," § 14. On this medieval notion see, e.g., McIlwain, *The Growth of Political Thought in the West* (1932), 225, 309; Gierke, *Das deutsche Genossenschaftsrecht*, II (1873), 546, and III (1881), 515. The term *monarcha* used by Vitoria is translated in Scott, *The Spanish Origin of International Law* (1934), App. C, lxxxiii, as "[spiritual] monarch." In reality, secular monarch was meant. See Appendix II, *infra*, n. 33.

94. Gierke, *op. cit.*, III, 571.

FRANCISCO SUÁREZ

95. *Selections from Three Works of Suárez* (1944—Classics of International Law), an English translation with preface by J. B. Scott (the three works are those cited in nn. 96 to 98); Scott, *The Catholic Conception of International Law*, (1934), 127; Sherwood, "Francisco Suárez," *Transactions of the Grotius Society*, XII (1927), 19; Lilley, "Francisco Suárez," in Hearnshaw, ed., *The Social and Political Ideas of Some Great Thinkers of the Sixteenth and Seventeenth Centuries* (1926), 90; Rolland, "Suárez," in Pillet, ed., *Les Fondateurs du droit international* (1904), 95; Barcia Trelles, "Francisco Suárez," in *Recueil des cours*, XLIII (1933), 389 [bibl.*], and the excellent dissertation of H. Rommen (Catholic theologian), *Die Staatslehre des Franz Suárez* (1926), 270. Biographical: Fichter (S.J.), *Man of Spain: Francis Suárez* (1940); outstanding is De Scoraille (S.J.), *François Suárez, de la compagnie de Jésus* (2 vols., 1912), where more biographies are referred to. Numerous Spanish publications on Suárez, for the most part from the very last years, are listed by Garcia Arias in his appendix to Nussbaum, *Historia del derecho internacional*, 435.

96. *Defensio fidei adversus Anglicanae sectae errores* (1613).

97. *De legibus ac Deo legislatore* (1612).

98. *De triplici virtute theologica* (1621). The chapter on war, "Disputatio XIII,

De bello," was translated by Vanderpol, *La Doctrine scholastique* (1919), 360, and analyzed by Rommen, *op. cit.*, 293.

99. With Suárez the word *civitas* is no longer restricted to "city."

100. It may result from the free use of anything that is within our power (*De legibus, etc.*, VII, 1, § 5).

101. The all-pervasive character of natural law is a fundamental tenet of the scholastics; it underlies, e.g., Suárez's *De legibus, etc.*, II, 8, § 5; II, 17, § 9; II, 19 § 2.

102. This is true especially of "slavery," which may be classified as an institution of municipal law or one of *jus gentium* in the sense of universal law. Suárez, in making it an instance of his "international" *jus gentium* (*De legibus, etc.*, II, 19, § 8), seems to think of slavery only as a result of defeat in war; but this is, of course, too narrow. Actually, slavery and the slave trade were an important element in the Spanish economic system during and after the Middle Ages. See Scelle, *Histoire politique de la traite négrière aux Indes de Castille, contrats et traités d'asiento*, I (1906), 83 ff., 91 ff., 121 ff., and *passim*; Nys, *Droit des gens, etc.*, 69.

103. Cf. Schilling, *Das Völkerrecht nach Thomas von Aquin* (1919), 28.

104. Suárez, *De legibus, etc.*, II, 19, § 9.

105. A nontechnical use of *provincia* was common among civilians as well as canonists (Gierke, *Development of Political Theory*, 279, n. 11).

106. Suárez does not specify them. But see *supra*, p. 87.

107. This statement has been attacked by Navarro, "Francisco Suárez y el derecho internacional moderno," *Revista española de derecho internacional*, I (1948), 369, and elsewhere. There is no convincing proof in Navarro's arguments.

108. Regout, *op. cit.*, 222, points out that this is "probabilism" (see "Probabilism," *Encyclopedia of Religion and Ethics*) only "in a very improper sense." Anyway, Suárez's tenet is unsatisfactory.

109. By Zouche (see p. 167). Zouche does not mention Suárez, however.

110. *De re militari et bello* (1558—transl. in *Classics of International Law*), X, 2, 22. Philip II had been criticized by Gentili in *De jure belli* (1588—transl. in *Classics of International Law*), I, 3, 25, for not having submitted his claims against Portugal to arbitration. Without citing Gentili, a Protestant, Suárez may have aimed at refuting him.

111. Regout, *op. cit.*, 193, 230, 250, 259.

MILITARY WRITERS: PIERINO BELLI AND BALTHASAR AYALA

112. *De re militari et bello tractatus* (trans. with an Introduction by Cavaglieri, in *Classics of International Law*). On Belli: Efsio Mulas, *Pierino Belli da Alba, precursore di Grozio* (1878), and Sereni, *The Italian Conception of International Law* (1943), 93, with references. Bibliographical data in Chialvo, "Nuove ricerche intorno a Pierino Belli," in *Bollettino storico-bibliografico subalpino*, XII (1907), 293, and XVI (1911), 1.

113. They are surveyed by Sereni, *op. cit.*, 88 f. From the viewpoint of the present treatise, they offer little interest, though one of the works in question was held worthy of inclusion in *Classics of International Law*: Giovanni da Legnano's *De bello, de represaliis et de duello* (1360), which deals, often in an abstruse manner, with theology, astrology, history, military art and virtues, and various legal matters, but only to a slight extent with international law, and this merely in connection with the question of just war.

114. *De re militari et bello*, II, 8, 18; VII, 6, 12. The elaboration of this by

Cavaglieri, *op. cit.*, 16a, which has been repeated by other writers, is not accurate.

115. *De jure et officiis bellicis et disciplina militari* (text and translation in Classics of International Law, 2 vols., with an Introduction by Westlake). Cf. also W. S. M. Knight, "Balthasar Ayala and His Work," *Journ. Comp. Legisl.*, 3rd series, III (1921), 220; Nys, "Le Traité de Balthasar Ayala," *Rev. droit int.* (1913), 225; Iribarne, "Balthasar de Ayala," *Revista española de derecho internacional*, I (1948), 125.

ALBERICO GENTILI

116. The leading work is van der Molen, *Alberico Gentili* (1937), with extensive bibliography, to which may be added Del Vecchio, *Ricordando Alberico Gentili* (1936). More recently Sereni, *op. cit.*, 105. Among the studies of earlier date Reiger, *Commentatio de Alberico Gentili* (Groningen, 1867), deserves special mention. Mulas, *op. cit.*, deals at length with Gentili and Belli's influence on him. Gentili's *Opera omnia* was published in 1770 in Naples by Gravier.

117. *De legationibus libri tres*, trans. in Classics of International Law. In this translation, the continual rendition of *jus gentium* by "international law" is particularly unfortunate.

118. *De jure belli libri tres* (originally *De jure belli commentatio*), transl. with an Introduction by Coleman Phillipson in Classics of International Law. The various editions are listed by van der Molen, *op. cit.*, 326.

119. *Hispanicae advocationis libri duo* (1613), transl. in Classics of International Law.

120. Fritze, "Clausula rebus sic stantibus," *Archiv für bürgerliches Recht*, XVII (1900), 20; Cattand, *La Clause "rebus sic stantibus" du droit privé au droit international* (thesis, Paris, 1924), 32. The *clausula* was also recognized by Suárez, *De triplici virtute theologica*, "Disp. XIII, De bello," § vii, n. 23 (see n. 98).

121. In the discussion of piracy (Book I, chap. xxv, p. 202) Gentili contrasts incidentally the *jus civile* with the *jus gentium* as "a pledge and a bond" respectively *inter cives* and *inter gentes*. Elsewhere the distinction is absent; see, e.g., Book I, chap. i, p. 12 (commerce is regulated by *jus gentium*), Book I, chap. xv, p. 107, where he speaks of the kinship, love, kindness, and fellowship established by nature, and asserts that *jus gentium* is based on this fellowship. In a private letter of 1594 Gentili expresses himself more accurately though not yet unambiguously (cf. van der Molen, *op. cit.*, 240).

122. Gentili did not cite Belli, but must have known his work. Cf. Mulas, *op. cit.*, 72.

123. Some references to Gentili by less important writers have been listed, apparently from an Italian source, by Rolin-Jacquemyns, "Quelques mots sur les hommages projetés à la mémoire de Grotius et d'Albéric Gentil," in *Rev. dr. int.*, VIII (1876), 690. One may add the laudatory remarks by Lord Liverpool, *Discourse on the Conduct of the Government of Great Britain in Respect to Neutral Nations* (2nd ed., 1759), 14. Regarding an eighteenth century edition of his works *supra*, n. 116.

124. In *Triquet v. Bath*, 7 Burr. 1478, 96 Eng. Rep. 273, 97 Eng. Rep. 936 (1764), where a question of diplomatic immunity was involved, Lord Mansfield adopted an earlier remark by Lord Talbot, who, though citing Grotius and other non-English writers, found that "there was no English writer of eminence upon the subject."

125. T. E. Holland, *Studies in International Law* (1898), 1.

HUGO GROTIUS: LIFE

126. Monographs and articles on Grotius amount to about a thousand. The main source is Ter Meulen, *Concise Bibliography of Hugo Grotius* (1925). The same author edited in 1950, together with Diermanse, a *Bibliographie des écrits imprimés de Hugo Grotius*. See also *Grotiana*, ed. by Vereeniging voor de Uitgave of Grotius (6 vols., 1928–1936). There is even an *Iconography* on Grotius by van Beresteyn (1929). As yet we do not possess an adequate biography of Grotius. The best available is by W. S. M. Knight, *Life and Works of Grotius* (1925). Van Eysinga, *Huigh de Groot* (1945), a scholarly biographical outline, presents its hero too much in terms of a pattern of excellence. R. W. Lee, *Hugo Grotius* (1931—also in *Proceedings of the British Academy*, Vol. XVI, 1931), gives, likewise in a compact study, a fuller appraisal of Grotius' personality and works; cf. also Lee's review of van Eysinga's book in *Law Quarterly Review* (1946), 53. Vreeland, *Hugo Grotius* (1917), and Gribling, *Hugo de Groot* (1947), are more in the nature of popular accounts.

Among the studies envisaging Grotius' general position in the history of European thought, special reference may be made to Hearnshaw, *The Social and Political Ideas of Some Great Thinkers of the Sixteenth and Seventeenth Centuries* (1926), 130; to Corsano, *Ugo Grozio: L'Umanista, il teologo, il jurista* (1948); and particularly to the spirited study by Eric Wolf, *Grotius, Pufendorf, Thomasius* (1927). Cf. also Hashagen, "Das geistige Gesicht des Hugo Grotius," *Zeitschrift für Völkerrecht*, XXIII, Supp. (1939), 33. Vrankrijker, *De Staatsleer van Hugo de Groot en Zijn Nederlandsche Tijdgenooten* (1937), is informative with respect to Grotius' actual attitude in Dutch politics. Grotius' theological achievements are judged with reserve by O. Ritschl, *Dogmengeschichte des Protestantismus*, III (1926), 343; more appreciative, J. Schlueter, *Die Theologie des Hugo Grotius* (1919), and in a measure, "Grotius," in *Encyclopedia of Religion and Ethics*.

127. *De jure praedae commentarius*, with an English translation and a Preface by Finch, in *Classics of International Law* (2 vols., 1950). The *Law of Spoils* is the subject of the article by Fruin mentioned in n. 61, preceding.

128. *Mare liberum sive de jure quod Batavis competit ad Indicana commercia dissertatio* (transl. into English by Magoffin, 1916). *De jure belli ac pacis*, Bk. II, Chap. 3, takes a more reserved attitude.

129. *Liber de antiquitate republicae Batavae* (1610). Cf. Vrankrijker, *op. cit.*, 69.

130. See particularly Vreeland, *op. cit.*, 131.

131. *De jure belli ac pacis libri tres, in quibus jus naturae et gentium; item juris publici praecipua explicantur* (transl. in *Classics of International Law*, 1925, with meager Introduction by J. B. Scott). On further editions see Ter Meulen and Diermanse, *op. cit.*, 222; on the genesis of the work, Vollenhoven, "The Growth of Grotius' *De jure belli ac pacis*," in *Bibliotheca Visseriana*, VI (1926), 131. Selections from the work have been published by W. S. M. Knight in "The Grotius Society Publications, Texts for Students of International Relations," No. 3 (1922); a translation by Wilson of the "Prolegomena" in *Amer. Journ. Int. Law*, XXXV (1941), 206.

132. Cf. H. F. Wright, "The Controversy of Hugo Grotius with Johan de Laet on the Origin of the American Aborigines," *Bibliotheca Visseriana*, VII (1928), 211; Uhlenbeck, "Hugo de Groot en de Oorsprong der Oude Bevolking van America," in *Mededeelingen der Koninklijke Akademie van Wetenschappen, Afdeling Letterkunde*, LXXII, Ser. B (1931), No. 2.

133. It is surprising and regrettable that the Swedish archives have not been investigated regarding Grotius' diplomatic activities.

HUGO GROTIUS: WORKS

134. Among analyses of *De jure belli ac pacis* the best are by von Kaltenborn, *Kritik des Völkerrechts* (1846), 37, and by Basdevant in Pillet, ed., in *Les Fondateurs du droit international* (1904), 180. Van Vollenhoven, "The Framework of Grotius' Book *De jure belli ac pacis*," *Verhandelingen der Koninklijke Akademie der Wetenschappen, Afdeeling Letterkunde*, XXX (1932), No. 4—also published separately—is eminently helpful in any study of the work. Other studies by Van Vollenhoven, outstanding specialist on Grotius, are sometimes unconvincing because of overemphasis on the idea of "punitive" war as a cornerstone of Grotius' system; see, e.g., "Grotius and Geneva," *Bibliotheca Visseriana*, VI (1926), 5, 27. Contra: Beaufort (of the Franciscan Order), *La Guerre comme institution de secours ou de punition* (1933), 156.

Of other discussions of Grotius' views on international law—listed up to 1936 by Ter Meulen and in *Grotiana* (*supra*, n. 112)—there may be mentioned Balogh, "The Traditional Element in Grotius' Conception of International Law," in *New York University of Law Quarterly Review*, VII (1930), 261; Gurvitch, "La Philosophie du droit de Grotius et la théorie moderne du droit international," in *Revue de métaphysique et de morale*, XXXIV (1927), 365; Regout (S.J.), *La Doctrine de la guerre juste* (1934), 274; Joubert, *Etude sur Grotius* (thesis, Paris, 1935); Lauterpacht, "The Grotian Tradition in International Law," *Brit. Yr. Bk. Int. Law*, XXIII (1946), 1.

135. Cf. Reiger, *Commentatio de Alberico Gentili*, 75. Grotius even borrowed several of Gentili's miscitations.

136. On Grotius' natural law doctrine, cf. Fortuin, *De Natuurrechtelijke Grondslagen van de Groot's Volkenrecht* (1946) [bibl.*]; Ottenwälder, *Zur Naturrechtslehre des Hugo Grotius* (1950). On the latter book Appendix II, *infra*, p. 304.

137. Besides natural law, Grotius mentions a "volitional" divine law dictated, according to Revelations, by God (without being derivable from natural law), but this conception remains inoperative in his system. Generally, his references to the Scriptures are meant to corroborate alleged rules of natural law.

138. Cf. Gierke, *The Development of Political Theory*, 77, 90 (n. 85).

139. On Grotius' use of the term *jus gentium*, cf. Clementinus a Vlissingen, *De evolutione definitionis juris gentium* (1940), 119, 170.

140. *Populus* means with Grotius the whole of the citizenry considered as a legal entity. Hence, his juxtaposition of *populi* and their *rectores*. He attributes sovereignty (*summum imperium*) to both of them. More on his terminology (*civitas*, *rex*, etc.) in Van Vollenhoven, *op. cit.* (n. 134). On Grotius' doctrine of sovereignty, see Gierke, *op. cit.*, 167, 312, and Van Vollenhoven, 5, 41.

141. Apart from such cursory phrases as used in "Prolegomena," 18, 28.

142. *Supra*, p. 83. The English attitude was vacillating at that time. Cf. T. W. Fulton, *The Sovereignty of the Sea* (1911), 101 ff.

143. Cf. Klee, *Hugo Grotius und Johannes Selden* (1946). The Portuguese Freitas, author of *De justo imperio Lusitanorum Asiatico* (1625), was another learned opponent of Grotius. Generally, see Fulton, *op. cit.*, 338; Nys, *Origines*, 379; Garcia Arias, *Historia del principio de la libertad de los mares* (1946); and, with an eye to fisheries, Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942), 7.

144. Brierly, *loc. cit. supra*, n. 60, vehemently polemizes against some panegyric views on Grotius which, as far as I know, have never been held by any responsible writer. These polemics have been misunderstood as supporting a disparagement of Grotius along the lines of J. B. Scott.

145. J. J. Rousseau was one of his severest critics. See Lassudrie-Duchène, J. J. *Rousseau et le droit des gens* (thesis, Paris, 1906), 94, 321.

146. Though this is not the main point, the reproaches addressed to him by his wife in her letter of April, 1640, should not be dismissed lightly. Cf. H. C. Rogge, *Brieven van en aan Maria van Reigersbergh* (1902), 235, n. 71.

147. More on this *infra*, pp. 302 ff.

148. The Chinese translation appeared in 1937; the Japanese, in 1950. Regarding Russian translations, see *infra*, pp. 248, 348, n. 120. In 1950, a new German translation was published by W. Schätzel.

149. In Holtzendorff's *Handbuch des Völkerrechts*, I (1885), 405.

CHAPTER V. FROM THE PEACE OF WESTPHALIA TO THE NAPOLEONIC WARS

THE PEACE AND ITS SEQUELS; PEACE OF UTRECHT

1. A careful edition of the text in Zeumer, *Quellensammlung zur Geschichte der deutschen Reichsverfassung in Mittelalter und Neuzeit* (2nd ed., 1913), 395. For a comment, C. G. de Koch, *Histoire abrégée des traités de paix*, I (1857), 69. See also Rapisardi-Mirabelli, "Le Congrès de Westphalie entre les puissances de l'Europe, etc.," *Bibliotheca Visseriana*, VIII (1929), 5; Gross, "The Peace of Westphalia," *Am. Journ. Int. Law*, XLII (1948), 20.

2. Wheaton (*infra*, p. 291) is an instance.

3. Dumont, *Corps universel diplomatique, etc.*, II (1), 463.

4. Remarkably, the Peace of Westphalia is still considered as pernicious by the foremost internationalist of totalitarian Spain, Barcia Trelles, "Westfalia, tres siglos después," *Revista española de derecho internacional*, I (1948), 303.

5. Dumont, *op. cit.*, VI (1), 429.

6. C. G. de Koch, *op. cit.*, 176; O. Weber, *Der Friede von Utrecht* (1891),

7. On the doctrinal implications of this concept, see *infra*, p. 137.

8. Nys, "La Révolution française et le droit international," in *Études*, I, 318; Redslob, "Völkerrechtliche Ideen der französischen Revolution," in *Festgabe für Otto Mayer* (1916), 273. Mirkine-Guetzévitch, "L'Influence de la révolution française sur le développement du droit international," in *Recueil des cours*, XXII (1928), 229, relates actually to political history, particularly to the antirevolutionary foreign policy of the czarist regime, rather than to international law.

9. Chevalley, *La Déclaration du droit des gens de l'Abbé Grégoire* (thesis, Paris, 1912); Allermann, *Die völkerrechtlichen Ideen des Abbé Grégoire* (thesis, Würzburg, 1916). The text of the Declaration is found in Nys, *op. cit.*, 395.

10. Decree of the National Assembly of May 22, 1790, incorporated in the Constitution of 1791, Title VI. Cf. Frank M. Anderson, *Constitutions and Other Select Documents Illustrative of the History of France, 1789-1907* (1908), 58.

11. Decree of the Convention of April 13, 1793, incorporated in the (voted but indefinitely suspended) Constitution of 1793, n. 119. Anderson, *op. cit.*, 212.

12. Decree of November 19, 1792, virtually followed by the Constitution of 1793, n. 118. Anderson, *op. cit.*, 183.

13. "Plebiscite" [bibl.*], in *Ency. Soc. Sc.*; Nys, *Etudes*, I, 364; Redslob, *op. cit.*, 295.
14. See Bogajewski, "Les Secours aux militaires malades et blessés avant le xix^e siècle," in *Revue générale de droit international public* (1909), 218; Nys, *Le Droit international*, III (1912), 501.
15. Emperor Joseph II had demanded the opening of the Scheldt on similar grounds. Cf. Bindoff, *The Scheldt Question to 1839* (1945), 138; Bovard, *La Liberté de navigation sur l'Escaut* (thesis, Lausanne, 1950); Giotto Pintor, "Le Régime international de l'Escaut," *Recueil des cours*, XXI (1928), 285; Van Eysinga, "Les Fleuves et canaux internationaux," *Bibliotheca Visseriana*, II (1924), 123.
16. For a possible influence of the revolutionary ideas upon the law of extradition see *infra*, p. 215.
17. Chevalley, *Essai sur le droit des gens napoléonien d'après la correspondance 1800-1807* (1912). See also Phillips and Reede, *The Napoleonic Period* (1936—Vol. II of Jessup., ed., *Neutrality: Its History, Economics, and Law*).
18. Cf. *Cambridge Modern History*, IX, 235; Oppenheim, I, sec. 131, with further references.
19. For references, see chap. iii, n. 38.
20. Martens, *Recueil de Traités, etc.*, II, 373; F. de Martens, *Das Konsularwesen und die Konsularjurisdiction im Orient* (transl. from the Russian by Skerst, 1874), 242.
21. The text of the treaty speaks broadly of "Christian" religion. Russia had already been recognized as protector of Greek Orthodox pilgrims to the Holy Land by the Peace of Belgrade (1729), Art. XI.

COUNTRIES OUTSIDE EUROPE

22. The Chinese Emperor's mandate in 1793 to George III of England, implying that only China had a civilization, is an instance. Whyte, *China and Foreign Powers: An Historical Review of Their Relations* (1927), 39.
23. De Martens, "Le Conflit entre la Russie et la Chine," *Rev. dr. int.*, XII (1880), 513; Morse and MacNair, *Far Eastern International Relations* (1931), 49.
24. See Kapp, *Friedrich der Grosse und die Vereinigten Staaten von America* (1871), 113, with valuable documentation; Lakaff, *Friedrich der Grosse und das Völkerrecht* (thesis, Göttingen, 1935), 52.

STATE PRACTICE: (A) PEACE

25. See Lassudrie-Duchène, *J. J. Rousseau et le droit des gens*, 128.
26. Cf. Krauske, *Die Entwicklung der ständigen Diplomatie* (1885), 23, 147.
27. See Vattel, *Droit des Gens*, II (1758), § 225.
28. Or even just for the satisfaction of their pleasure. V. Loewe, *Preussische Staatsverträge aus der Regierungszeit Friedrich Wilhelms I* (1913), No. 4, reports a treaty by which the Duke of Mecklenburg promised to that Prussian king twenty recruits in return for the temporary grant of a hunting lease.
29. Fouques-Duparc, *La Protection des minorités de race, de langue et de religion* (1922).
30. Art. IV of the treaty, Martens, *Recueil de traités, etc.*, IV, 110 (guarantee of the status quo in the provinces ceded to Austria).

31. An ostensibly similar regulation in the Austro-Russian treaty of 1785, Martens, *Recueil de traités, etc.*, II, 621, was actually much more limited.
32. J. Allen, *The Navigation Laws of Great Britain* (1849), 17; Butler and Maccoby, *The Development of International Law*, 217; "Acts of Trade" in *Ency. Soc. Sc.*
33. Amé, *Etude sur les tarifs de douane et sur les traités de commerce*, I (1876), 6.
34. *La Traite négrière aux Indes de Castille, contrats et traités d'asiento* (2 vols., 1906).
35. 2 Will. III, c. 7; J. W. Cecil Turner, *Russell on Crime*, I (9th ed., 1936), 51.
36. *Quaestiones juris publici*, Book I, chap. XVII.
37. See F. Monaghan, *John Jay* (1935), 291.

STATE PRACTICE: (B) WAR

38. Nef, "Limited Warfare and the Progress of European Civilization, 1640-1740," *Review of Politics*, VI (1944), 275; *Ency. Britannica*, 1952 ed., XXIII, 331 (in article "War").
39. *Supra*, p. 124.
40. L. Sterne, *A Sentimental Journey Through France and Italy* (1768—Shakespeare Head Press ed., 1921), 85.
41. J. A. Paris, *Life of Sir Humphry Davy* (1831), chap. X.
42. Wauthoz, *Les Ambulances et les ambulanciers à travers les siècles*, 107, 124. For an isolated fifteenth century example (Charles the Bold of Burgundy, 1439), *ibid.*, 91.
43. Gurlt, *Zur Geschichte der internationalen und freiwilligen Krankenpflege im Kriege* (1873), listing without much discrimination numerous agreements in point: Bogajewski, "Les Secours aux militaires malades et blessés avant le XIX^e siècle," in *Revue générale de droit international public* (1909), 202.
44. Romberg, *Des Belligérants et des prisonniers de guerre* (1894), 13.
45. In reality, the rule was known before 1756. Briggs, *The Doctrine of Continuous Voyage* (1926), 12.
46. See Briggs, *loc. cit.*, and copious literature cited by Oppenheim, *Int. Law*, II, § 400.
47. Roscoe, *Lord Stowell: His Life and the Development of English Prize Law* (1916). Lord Stowell's opinions were widely followed in the United States.
48. Satow, *The Silesian Loan and Frederick the Great* (1915); G. F. von Martens, *Erzählungen merkwürdiger Fälle des neueren europäischen Völkerrechts*, I (1800), 236.
49. Sailer, *Die bewaffnete Neutralität, etc.* (thesis, Würzburg, 1933); Bergbohm, *Bewaffnete Neutralität, 1780-1783* (1883). Cf. also Kulsrud, *Maritime Neutrality to 1780* (1936), 173; Kleen, *Lois et usages de la neutralité d'après le droit international conventionnel et coutumier des états civilisés*, I (1898), 20, II (1900), 349; further references in von Liszt, *Das Völkerrecht* (12th ed., 1925), 23, n. 8.
50. On this see especially Bergbohm, *op. cit.*
51. See *infra*, p. 192.
52. Cf. Sereni, *The Italian Conception of International Law* (1943), 135, with references. Some of the edicts are found in Lampredi, *Del Commercio dei popoli neutrali in tempo di guerra* (1788; French tr. by Peuchet, 1802), Appendix.
53. Fenwick, *The Neutrality Laws of the United States* (1913), 27.
54. Earlier studies on the subject have been superseded by the able article by

Bullock, "Angary," in *Br. Yr. Bk. Int. Law*, III (1922-1923), 99. A vast bibliography in Oppenheim, II, § 364. Among the early writings may be mentioned Lucenius' *De jure maritimo* (1669), I, chap. v.

55. Gorgé, *La Neutralité Helvétique* (1947), 39, mentions some minor incidents to the contrary.

DOCTRINAL DEVELOPMENTS

56. Lord Talbot's remarks are recited in *Triquet v. Bath*, 7 Burr. 1478, 96 Eng. Rep. 273, 97 Eng. Rep. 936 (1764). The case of 1737 (Barbuit's Case) may conveniently be found in 25 English Reports, 777.

57. On this subject, Lauterpacht, "Is International Law a Part of the Law of England?" *Transactions of the Grotius Society*, XXV (1940), 51.

58. *Supra*, p. 75. See also Lauterpacht, *op. cit.*, 52.

59. *Infra*, p. 278.

60. Among the more recent monographs, mention may be made of Höijer, *La Théorie de l'équilibre et le droit des gens* (thesis, Paris, 1917). See furthermore *Ency. Soc. Sc.*, "Balance of Power" [bibl.*], and, regarding Sir Robert Phillimore's view, *infra*, p. 247.

61. Teaching of international law was begun in France in 1775. D'Irsay, *Histoire des universités françaises et étrangères*, II (1935), 132.

62. The book was somewhat outside the proper field of its author, a historian and Romanist. See the article "Bouchaud" in Michaud, ed., *Biographie universelle*. According to von Kamptz, *Neue Litteratur des Völkerrechts seit dem Jahre 1784* (1817), 16, Bouchaud was a bookkeeper at Bordeaux before becoming a professor of law. This seems to be a misstatement.

63. On these cf. von Ompteda, *Litteratur des gesamten sowohl natürlichen als positiven Völkerrechts* (1785), 429; von Kaltenborn, *Kritik des Völkerrechts nach dem jetzigen Standpunkt der Wissenschaft* (1847), 62; Myers, *Manual of Collections of Treaties and of Collections Relating to Treaties* (1922).

64. Leibniz's preface is extensive and important, however. On his views see Schrecker, "Leibniz: Ses idées sur l'organisation internationale," *Proceedings of the British Academy*, 1937, 193.

65. See Lassudrie-Duchène, *J. J. Rousseau et le droit des gens* (1906), especially p. 310.

66. Bluntschli, *Beuterecht im Kriege* (1878), 67.

67. We may also cite Lord Liverpool's *Discourse on the Conduct of the Government of Great Britain Respecting Neutral Nations* (1759), vindicating the English capture of enemy goods on neutral ships during the Seven Years' War. For further references see Martens, *Précis du droit des gens* (posthumous ed., 1858, by Vergé), § 314 n. More general in purpose, Botticé, *Essai sur la genèse et l'évolution de la notion de neutralité* (thesis, Aix, 1937), especially p. 146.

68. Actually the book was written for use in a diplomatic mission of Huebner's. Von Eggers, *Denkwürdigkeiten aus dem Leben des Königlich Dänischen Staatsministers Andreas Petrus Grafen von Bernstorff* (1800), 127. Regarding Count von Bernstorff, see also *supra*, p. 133.

69. *Doveri dei principi neutrali verso i principi guerreggianti e di questi verso i neutrali*, 2 vols. (transl. by Cäsar as *Das Recht der Neutralität*).

70. *Del commercio dei popoli neutrali in tempo di guerra*.

71. See also Lord Liverpool, *op. cit.*

72. William Penn, *Essay Towards the Present and Future Peace of Europe*

(American Peace Society ed., 1912). Cf. also Ter Meulen, *Der Gedanke der internationalen Organisation in seiner Entwicklung I* (1917), 171; C. L. Lange, "Histoire de la doctrine pacifique et de son influence sur le développement du droit international," in *Recueil des cours*, XIII (1926), 175, 275.

73. The leading work on Saint-Pierre is Drouet, *L'Abbé de Saint-Pierre: L'Homme et l'œuvre* (1912). On his peace plans see Ter Meulen, *op. cit.*, 180; Lange, "Histoire de la doctrine pacifique, etc.," in *Recueil des cours*, XIII (1926), 302; H. H. Post, *La Société des nations de l'Abbé de Saint-Pierre* (an able thesis—Groningen, 1932). There exist several versions with different titles of the *Projet*, which has been translated into English (1714) and other languages including German (von Oppeln-Bronikowski, 1922). Selection in "The Grotius Society Publications, Texts for Students on International Relations," No. 5 (1927).

74. The pamphlet is not contained in Saint-Pierre's collected works (*Ouvrages de politique*, 16 vols.), which were published during his lifetime. The writer relies on Ter Meulen, *op. cit.*, 217. Cf. also Drouet, *op. cit.*, 136.

75. *Zum ewigen Frieden: Ein philosophischer Entwurf* (prefaced and annotated by Vorländer, 1914). Several English translations have appeared, one of them (*Perpetual Peace*) with an Introduction by Nicholas Murray Butler (New York, 1939). See furthermore, Natorp, *Kant über Krieg und Frieden* (1924), and Ter Meulen, *op. cit.*, 314.

DENIERS OF INTERNATIONAL LAW

76. Cf. Walz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (1930), 4, 182; Brierly, "Le Fondement obligatoire du droit international," in *Recueil des cours*, XXIII (1928), 467, 494, 505. Hobbes's contributions to legal science in general are discussed by Montmorency, "Thomas Hobbes," in *Journ. Comp. Legisl.*, N.S. VIII (1907), 51; his teachings in regard to political theory, by Leo Strauss, *The Political Philosophy of Hobbes* (1936), and Sabine, *A History of Political Theory* (rev. ed., 1950), chap. xxiii. The more important among Hobbes's utterances relative to the present discussion have been compiled in both the Latin and the English texts by Van Vollenhoven, *Bibliotheca Visseriana*, VI (1926), 67 (*De cive*), 74 (*De corpore politico* and *Leviathan*). Prof. Leo Strauss, Chicago, has generously aided me in the exposition of Hobbes's doctrine.

77. Hobbes's translation of the original Latin title.

78. Lauterpacht, "Spinoza and International Law," *Br. Yr. Bk. Int. Law*, VIII (1927), 89; R. A. Duff, *Spinoza's Political and Ethical Philosophy* (1903), chap. xxv; Coert, *Spinoza en Grotius met Betrekking tot het Volkenrecht* (1936); Menzel (see n. 16 to chap. iv); Walz, *op. cit.*, 18; Verdross, "Das Völkerrecht im System von Spinoza," *Zeitschrift für öffentliches Recht*, VII (1928), 100.

THE NATURALISTS

79. See Walz, *op. cit.*, 26; Avril, "Pufendorf," in Pillet, ed., *Les Fondateurs du droit international* (1904), 331. For general discussions of Pufendorf's life and work, Coleman Phillipson, "Samuel Pufendorf," *Journ. Comp. Legisl.*, N.S. XII (1911), 233; von Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, III, Part I (1898), 11 and "Noten" 5; article "Pufendorf," in *Allgemeine deutsche Biographie*; E. Wolf, *Grotius, Pufendorf, Thomasius* (1927), 63, with further bibliography.

80. *Elementorum jurisprudentiae universalis libri duo* (transl. in Classics of International Law, 1931, with Introduction by Wehberg).

81. *De jure naturae et gentium libri octo* (transl. in Classics of International Law, with insignificant Introduction by Simons). As to international law, III, 3, sec. 23 is *sedes materiae*. See furthermore I, 6, secs. 13 and 18 (kinds of law); II, 2, sec. 11 (treaties); VIII, 4, secs. 18, 22 (equality); VIII, 6, 7 (law of war), and, generally, Preface.

82. *De officiis hominis et civis libri duo* (transl. in Classics of International Law, 1941, with Introduction by Schücking).

83. The *Déclaration des droits de l'homme et du citoyen* (p. 119, *supra*) recalls the title of Pufendorf's book in the preceding notes.

84. Cf. Frauendienst, *Christian Wolff als Staatsdenker* (in *Historische Studien*, Vol. CLXXI, 1927); Windelband, *Geschichte der neueren Philosophie*, I (1914), 514; von Stintzing and Landsberg, *op. cit.*, 198 and "Noten" 132; article "Christian Wolff," in *Allgemeine deutsche Biographie*.

85. *Jus naturae methodo scientifica perpetratum*.

86. *Jus gentium methodo scientifica perpetratum* (transl. in Classics of International Law, with Introduction by Nippold). Since the volume has no table of contents, it may be mentioned that the following parts of the work are primarily in point for the present discussion: Preface, Prolegomena, secs. 285, 286, 617-645, 673-686, 888-891, 1041-1068. The work is epitomized in chap. iv of the *Institutiones* (see the following note). Olive, "Wolff," in Pillet, *op. cit.*, 447, likewise gives a summary on which is based Gidel, "Droits et devoirs de nations," in *Recueil des cours*, X (1925), 565. For a critical analysis, von Kaltenborn, *Kritik des Völkerrechts* (1847), 67, 275; cf. also von Ompteda, *Litteratur des gesamten sowohl natürlichen wie positiven Völkerrechts* (1785), 320.

87. *Institutiones juris naturae et gentium* (transl. with annotations by Luzac, *Institutions du droit de la nature et des gens*, 1772).

88. Wolff uses this term only in respect to individuals. *Institutiones*, I, secs. 74, 100.

89. For instance, by Nippold (see n. 86), who is led thereby to a highly questionable appraisal of Wolff's teachings.

90. *Jus gentium* (see n. 86), sec. 891, note.

91. Wolff explains that, while the natural does not conform to the necessary law, it does not altogether differ from it. *Jus gentium*, Prolegomena, sec. 21.

92. Cf. Mallarmé, "Vattel" in Pillet, ed., *Les Fondateurs du droit international* (1904), 481; Lapradelle (see following note); Coleman Phillipson, "Emerich de Vattel," in Macdonell and Manson, eds., *Great Jurists of the World* (1914), and (under the name J. E. G. Montmorency) in *Journ. Comp. Legisl.*, N.S. X (1909), 17, is mainly concerned with Vattel's political theory. Béguelin, "En souvenir de Vattel" in *Faculté de Droit de l'Université de Neuchâtel, Recueil de travaux* (1929), 35, is a biographical study, amply documented.

93. The best edition was published by Pradier-Fodéré (1863). Among the English editions Chitty's (1854, often reprinted) takes first place. The edition in the Classics of International Law (1916, French and English) contains a brilliant and instructive Introduction by Lapradelle. An original and incisive analysis in von Kaltenborn, *Kritik des Völkerrechts* (1847), 78. Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1919), denounces Vattel for distorting Grotius and vitiating the true law of nations. This is well refuted by H. Staub, *Die völkerrechtlichen Lehren Vattels im Lichte der naturrechtlichen Doctrin* (thesis, Berne, 1921). See also n. 134 to chap. iv.

94. *Armitz Brown v. United States*, 8 Cranch (12 U.S.) 110.

95. *Die Geschichte und Literatur der Staatswissenschaften*, I (1855), 386. Curiously, the term "oracle" was also applied to Vattel by Mancini in 1851 (see Lapradelle, *op. cit.*, xlii n.); but evidently both writers arrived at the same phrase independently.

96. Fenwick, "The Authority of Vattel," in *Amer. Pol. Science Review*, VII (1913), 395, and VIII (1914), 375; Reeves, "The Influence of the law of nature upon international law in the United States," in *Amer. Journ. Int. Law*, III (1909), 547. Both are valuable studies.

97. "Changing Concepts and the Doctrine of Incorporation," *Amer. Journ. Int. Law*, XXVI (1932), 259, n. 132. See also Ziegler, *The International Law of John Marshall* (1939), Index sub "Vattel."

98. 120 U.S. 479.

99. *Principes du droit politique* (1751)—republished after his death together with another work of his as *Principes du droit de la nature et des gens*. On Bourlamaqui see Rivier, "Literarhistorische Übersicht, etc." in Holtzendorff's *Handbuch des Völkerrechts*, I (1888), 433, and the article "Bourlamaqui" in Michaud, *Biographie Universelle*.

100. See *infra*, p. 172. On Barbeyrac see Rivier, *op. cit.*, 431, the article "Barbeyrac" in Michaud, *op. cit.*, and Meylan, *Jean Barbeyrac et les débuts de l'enseignement du droit international dans l'ancienne Académie de Lausanne* (1937).

101. John Locke, *Of Civil Government* (1690), II, chap. xvi, § 176 (Everyman's Library ed.).

102. This applies, e.g., to the *Fundamenta juris naturae et gentium ex sensu communi deducta* (1705) of the celebrated German publicist Christian Thomasius.

THE EARLY POSITIVISTS

103. Scelle, "Zouch," in Pillet, ed., *Les Fondateurs du droit international*, 270; Phillipson, "Richard Zouch," *Journ. Comp. Legisl.*, N.S. IX (1909), 281; Walter, *Richard Zouch und seine Bedeutung für das Völkerrecht* (thesis, Würzburg, 1927). Cf. also Holland, Introduction to the transl. (1911—Classics of International Law) of Zouche, *Juris et judicii feccialis, etc.*

104. *Solutio quaestionis veteris et novae, sive de legati delinquentis judice competente dissertatio* (1657).

105. The spellings "feciale" and "fetiale" are both in use.

106. *Elementa jurisprudentiae definitionibus regulis et sententiis selectionibus juris civilis illustrata* (1621).

107. Like Gentili he was not referred to in *Triquet v. Bath*, 7 Burr. 1478, 96 Eng. Rep. 273, 97 Eng. 936 (1764).

108. Phillipson, "Cornelius van Bynkershoek," *Journ. Comp. Legisl.*, N.S. IX (1908), 27. See Louter, Introduction to the transl. (1930—Classics of International Law) of Bynkershoek, *Quaestionum juris publici libri duo*; Delpech, "Bynkershoek," in Pillet, *op. cit.*, 385; von Kaltenborn, *Kritik des Völkerrechts* (1847), 97; Garcia Arias, "De betekenis van Cornelis van Bynkershoek over the leer van het Internationaal Recht," *Rechtskundig Weekblad*, 1949, 1090; Reibstein, "Von Grotius zu Bynkershoek," *Archiv des Völkerrechts*, IV (1953) 1. A meticulous but pedestrian biography was published by O. W. Star Numan, *Cornelis van Bynkershoek: Zijn Leven en zijne Geschriften* (1869).

109. *De dominio maris dissertatio* (transl. in Classics of Magoffin, International Law, 1923).

110. *De foro legatorum*.

111. *Quaestionum juris publici libri duo*.
112. *Supra*, pp. 139 ff.
113. *Quaestionum juris publici libri duo*, I, 9.
114. *Ibid.*, II, 10.
115. *Ware v. Hylton*, 2 Dall. 262. In *The Schooner Exchange v. McFadden*, 7 Cranch 144 (1812), the same court calls him "a jurist of great reputation."
116. Rühlmann, "Samuel Rachel, der Bahnbrecher des völkerrechtlichen Positivismus," in *Zeitschrift für internationales Recht* (1925), 1; von Kaltenborn, *Kritik des Völkerrechts* (1847), 57; von Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft*, III, Part I (1898), 33 and "Noten" 19.
117. *De jure naturae et gentium dissertationes* (transl. in *Classics of International Law*, with Introduction by von Bar, 1916).
118. *Synopsis juris gentium* (transl. in *Classics of International Law*, with Introduction by von Bar, 1916).
119. See von Kaltenborn, *op. cit.*, 61; von Stintzing and Landsberg, *op. cit.*, 42.

THE LATER POSITIVISTS

120. L. Becher, *Johann Jakob Moser und seine Bedeutung für das Völkerrecht* (thesis, Würzburg, 1927); Verdross, "J. J. Mosers Programm einer Völkerrechtswissenschaft der Erfahrung," in *Zeitschrift für öffentliches Recht*, III (1922-1923), 96; von Stintzing and Landsberg, *op. cit.*, 315 and "Noten" 212; von Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, II (1856), 401; von Kaltenborn, *op. cit.*, 9. Unrelated to Moser's work on the law of nations: "J. J. Moser," in *Allgemeine deutsche Biographie*; Marianne Fröhlich, *Johann Jakob Moser und sein Verhältnis zum Rationalismus und Pietismus* (Vienna, 1925).
121. The most important being *Grundsätze des jetzt üblichen europäischen Völkerrechts* (1763), epitomized by Huber in *Zeitschrift für Politik*, VII (1914), 377.
122. *Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegzeiten, vornehmlich aus denen Staatshandlungen derer europäischen Mächten, auch anderen Begebenheiten, so sich seit dem Tode Kaiser Karls VI im Jahre 1740 zugetragen haben*.
123. *Beyträge zu dem neuesten europäischen Völkerrecht in Friedenszeiten* (5 vols., 1778-1781); *Beyträge zu dem neuesten europäischen Völkerrecht in Kriegzeiten* (3 vols., 1779-1781).
124. W. S. M. Knight, *Life and Works of Hugo Grotius* (1925), 201.
125. Bailby, "Georges-Frédéric de Martens," in Pillet, ed., *Les Fondateurs du droit international* (1904), 603; Hubrich, "G. F. von Martens und die moderne Völkerrechtswissenschaft," in *Zeitschrift für Politik*, VII (1914), 362; von Stintzing and Landsberg, *op. cit.*, 487 and "Noten" 212; von Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, II (1856), 460; von Kaltenborn, *op. cit.*, 109, 289. Biographical: the greatly informative study by Habenicht, *Georg Friedrich von Martens* (1934 [bibl.*]); "G. F. von Martens" and, for some details, "F. von Berlepsch," in *Allgemeine deutsche Biographie*. Cf. also H. von Treitschke, *Deutsche Geschichte im neunzehnten Jahrhundert* (3rd ed., 1886), II, 153.
126. *Versuch über die Existenz eines positiven europäischen Völkerrechts und den Nutzen dieser Wissenschaft*, excerpted by Hubrich, *op. cit.*
127. On the editions and translations of the *Précis*, see p. 184. A commendable edition with ample annotation was prepared by Vergé in two volumes (Paris, 1858). Unfortunately, the *Classics of International Law*, which allow precious

space to such writers as Legnano and Textor, do not include von Martens's *Précis*.

128. *Supra*, p. 139.

129. *Erzählungen merkwürdiger Rechtsfälle des neueren europäischen Völkerrechts*.

130. *Essai concernant les armateurs, les prises et surtout les reprises* (in French and German; English translation by T. H. Horne in 1801).

131. *Grundriss des Handelsrechts* (1st ed., 1796; 2nd ed., 1805; 3rd ed., 1820).

132. Among the applications of this right von Martens, man of the *ancien régime*, mentions marriages and testamentary provisions. He also points to treaties "cemented at the end of a legitimate war" (*guerre légitime*). This desultory remark does not seem to resume the doctrine of "just" war (see *Précis*, secs. 50, 120, 265). Probably he considered wars by revolutionary powers as not "legitimate."

133. For instance, by the American Institute of International Law, *Amer. Journ. Int. Law*, X (1916), 212. On the Inter-American Convention on Rights and Duties of States, see p. 262.

134. The discourse is found in the Preface to the German edition of the *Précis* (1796); it is reproduced in Vergé's edition (1858).

135. The work was greatly altered in the second edition.

136. *An Introduction to the Principles of Morals and Legislation* (1789), chap. II, 14, n. 1 (6).

CHAPTER VI

FROM THE CONGRESS OF VIENNA TO THE FIRST WORLD WAR

MAIN POLITICAL AGREEMENTS AND DECLARATIONS

1. Chodźko (Comte d'Angeberg), *Le Congrès de Vienne et les traités de 1815* (4 vols., 1864); C. K. Webster, *The Congress of Vienna, 1814-1815* (1919—repeatedly reprinted); Rie, "The Origins of Public Law and the Congress of Vienna," *Transactions of the Grotius Society*, XXXII (1951), 209.

2. Careful references to the official material in Ogilvie, *International Waterways*, I (1920), 229 ff.

3. For particulars see Oppenheim, *International Law*, I § 340 h; von Liszt, *Völkerrecht* (5th ed., 1924), 384. Von Martitz, "Das internationale System zur Unterdrückung des afrikanischen Sklavenhandels," *Archiv für öffentliches Recht*, I (1886), 1, deserves special mention.

4. Schweizer, *Geschichte der schweizerischen Neutralität* (1895), 580 ff.; Bonjour, *Geschichte der schweizerischen Neutralität* (1946), 81 ff.

5. Cf. Dupuis, *Le Principe d'équilibre et le concert européen* (1909), 114; Nys, "Le Concert européen et la notion du droit international," in *Etudes*, II, 1.

6. A. von Srbik, *Metternich, der Staatsmann und der Mensch*, I (1925), 625, 626.

7. Abundant bibliography is listed by Oppenheim, I, § 139. Cf. particularly D. Y. Thomas, *One Hundred Years of the Monroe Doctrine, 1823-1923* (1923); Barcia Trelles, "La Doctrine de Monroe," in *Recueil des cours*, XXXII (1930), 397; Kraus, *Die Monroedoktrin* (1913), and, covering more recent developments, Dexter Perkins, *Hands Off: A History of the Monroe Doctrine* (1941).

8. Only the barring of further European colonization of American territory by

Monroe's message was protested by Great Britain and Russia; but no such colonization was subsequently attempted.

9. The invocation of the Monroe Doctrine in the boundary dispute between Great Britain and Venezuela (1896) also led to a conflict; namely, between the United States and Great Britain. See p. 219.

10. *Infra*, p. 261.

11. There were, however, some precedents in the nineteenth century. See Temperley, ed., *A History of the Peace Conference of Paris*, V (1921), 112.

12. W. O. Henderson, *The Zollverein* (1930); Eichmann, *Der Deutsche Zollverein 1834-67* (1935).

13. See *supra*, pp. 56, 65.

14. Morse and MacNair, *Far Eastern International Relations* (1931); Morse, *The International Relations of the Chinese Empire* (3 vols., 1910-1918); Mingchien Joshua Bau, *Foreign Relations of China* (2nd ed., 1922), especially chap. iv; Tyau, *The Legal Obligations Arising Out of Treaty Relations Between China and Other States* (1917); MacMurray, *Treaties and Agreements With and Concerning China, 1894-1919* (2 vols., 1921); W. F. Mayers, *Treaties Between the Empire of China and Foreign Powers* (5th ed., Shanghai, 1906); Roy Hidemichi Akagi, *Japan's Foreign Relations, 1542-1936* (Tokyo, 1936); Seiji G. Hishida, *The International Position of Japan as a Great Power* (1905); Tokutomi, *Japanese-American Relations* (transl. from the Japanese, 1922).

15. *Supra*, p. 56.

GROWTH OF WRITTEN LAW: THE NEW ERA

16. Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), 13.

17. DeWitt C. Poole, *The Conduct of Foreign Relations Under Modern Democratic Conditions* (1924), 29.

18. For particulars with respect to the following see Satow, *A Guide to Diplomatic Practice* (3rd ed., 1932), I, secs. 21 ff., 72 ff., 89 ff.

19. If one disregards the abortive league against the Turks of 1518, *supra*, p. 44.

20. Vitta, "Droit sanitaire international," *Recueil des cours*, XXXIII (1930),

549. No organization was provided by the International Opium Convention of 1912.

21. In addition we may mention the International Meter Convention of 1875 for the perfection of the metric system (central organ, the International Bureau of Weights and Standards in Paris).

Hudson, ed., *International Legislation*, I (1931), Introduction, xix, lists "Multi-partite International Instruments 1864-1914." Open and organizational treaties are not marked in the list. See also Oppenheim, I, Appendix A, "List of the More Important General Conventions of a Non-political Character."

22. Lowe, *The International Protection of Labor: International Labor Organization, History and Law* (1935), 112; Macdonell, "International Labour Conventions," in *British Yr. Bk. Int. Law* (1920-1921), 191. The conventions restricting "indentured" labor, as listed by Macdonell, belong rather to the antislavery group.

23. Leridon, *Le Problème des doubles impositions internationales* (thesis, Caen, 1929), 76.

24. See (U.S.) Dept. of State, *List of Treaties Submitted to the Senate Which Have Not Gone into Force* (1932). Cf. also Fleming, *The Treaty Veto of the Senate* (1930), 309.

25. Mirkin-Guetzévitch, "Droit international et droit constitutionnel," in *Recueil des cours*, XXXVIII (1931), 311.

26. Cf. Oppenheim, I, sec. 497 [bibl.*].
27. *Supra*, p. 120.
28. Dunn, *The Practice and Procedure of International Conferences* (1929); Satow, *International Congresses* (1920).
29. *Infra*, p. 225. We leave aside such insignificant meetings as the sanitary conferences of 1851 and 1859 mentioned by Vitta, *op. cit.*, 564, 565, as well as meetings of private organizations.
30. E.g., pp. 28, 31, 125, 133. Von Martens, *Erzählungen merkwürdiger Rechtsfälle des neueren europäischen Völkerrechts*, I, 330 ff., II, 344 ff., lists a great number of statutes and ordinances of various countries concerning the privileges of diplomatic agents.
31. Mateesco, *La Coutume dans les cycles juridiques internationaux* (1947), an extensive and comparative study including international law, fails conspicuously in stating accepted international customs of our day.
32. This has been shown in the courageous study *Chiffons de papier*, by Alcide Ebray, a former French diplomat. Infraction of a nonpolitical treaty is very rare. An example would be the violation in 1921 of the Latin Monetary Union by Switzerland, to which the Union then had become oppressive indeed. Cf. Nussbaum, *Money in the Law: National and International* (1950), 507.
33. See, e.g., "Concordat," in the *Catholic Encyclopedia*, IV, 200; Cathrein (S.J.), *Moralphilosophie* (2nd ed., 1893), II, 634.

TREATIES ON COMMERCIAL AND RELATED MATTERS

34. De Nolde, "Droit et technique des traités du commerce," in *Recueil des cours*, III (1924), 293; von Melle, "Handels- und Schiffsverkehrsverträge," in Holtzendorff's *Handbuch des Völkerrechts*, III (1887), 143. Material on the early part of the period is found in D'Hauterive et Cussy, *Recueil des traités de commerce* (10 vols., 1834-1844).
35. De Nolde, "Clause de la nation la plus favorisée," in *Recueil des cours*, XXXIX (1932), 5; Glier, *Die Meistbegünstigungsklausel* (1905), 18. In general, the vast literature on the most-favored-nation clause—see Oppenheim, I, § 580, and Lapradelle and Niboyet, "Clause de la nation la plus favorisée," in *Répertoire de droit international* (1929)—deals very little with the historical aspects of the subject. See also *supra*, p. 33.
36. There were a few limited tariff conventions with Canada and Cuba. Cf. U.S. Tariff Commission, *Reciprocity and Commercial Treaties* (1919).
37. Mikusch, *Geschichte der internationalen Zuckerkonventionen* (1932).
38. *Infra*, p. 266.
39. Contuzzi, *Trattato teorico-pratico di diritto consolare* (2 vols., 1910-1911); von Bulmerincq, "Consularrecht," in Holtzendorff's *Handbuch des Völkerrechts*, III (1887), 685; Stuart, "Le Droit et la pratique diplomatiques et consulaires," in *Recueil des cours*, XLVIII (1934), 463, 483.
40. *Supra*, p. 125.
41. See *supra*, pp. 56, 64. Ravaut-Bignon, *Du droit de police des consuls dans les pays hors-chréienté* (thesis, Paris, 1905); Nys, *Le Droit international*, II (1912), 460; and for further references, Oppenheim, I, §§ 438, 318.
42. Cf. Mandelstam, *La Justice ottomane* (1911).
43. Von König, "Der Konsulardienst der wichtigsten Handelsmächte und seine Bedeutung für das Wirtschaftsleben," in *Zeitschrift für Politik*, III (1910), 322.

44. For particulars, see Nussbaum, "International Monetary Agreements," *Amer. Journ. Int. Law*, XXXVIII (1944), 242.
 45. *Supra*, p. 193.
 46. Von Martens, *Nouveau Recueil*, 2nd ser., XXXIV, 238, Art. 31 ff.

TREATIES ON PRIVATE INTERNATIONAL LAW AND JUDICIAL ASSISTANCE

47. *Supra*, p. 40.
 48. Nussbaum, *Principles of Private International Law* (1943), 47, with references.
 49. Pradier-Fodéré, "Le Congrès de droit international sud-américain et les traités de Montevideo," *Rev. dr. int.*, XXI (1889), 217, 561.
 50. Ladas, *The International Law of Industrial Property* (1930) and *The International Protection of Literary and Artistic Property* (2 vols., 1938).
 51. Ladas, *Int. Prot. of Lit. and Art. Prop.*, 922. "Pan-American" efforts in the field suffered greatly from the frustration to which we have repeatedly referred. Ladas, §§ 330 ff.
 52. Lammasch, "Staatsverträge betreffend Rechtshilfe und Auslieferung," in Holtzendorff's *Handbuch des Völkerrechts*, III (1887), 345, 457; Bosch, *Asyl en Uitlevering* (thesis, Utrecht, 1885); much material in Billot, *Traité de l'extradition* (1874). P. Bernard, *Traité théorique et pratique de l'extradition*, Vol. I, *Introduction historique* (2nd ed., 1893) is inadequate (the criticism by Lammasch, 461, n. 2, also applies to this edition). Copious bibliography in Oppenheim, before § 327.
 53. *Supra*, pp. 2, 48. The attempt of Saint-Aubin, *L'Extradition et le droit extraditionnel*, I (1913), 14, to represent an agreement made in 1376 between Charles V of France and the Count of Savoy as an anticipation of modern extradition treaties is unconvincing.
 54. On this important piece of legislation, see von Martitz, *Internationale Rechtshilfe in Strafsachen*, II (1897), chap. v.
 55. Figures are given by Lammasch, *Auslieferungspflicht und Asylrecht* (1887), 71, 872. There is a great need for recent statistical data. On the modern law of extradition, see American Society of International Law, *Research in International Law*, (I) *Extradition* (1935).

INTERNATIONAL DISPUTES

56. Wuarin, *Essai sur les emprunts d'états* (thesis, Geneva, 1907); Sir John Fischer Williams, "International Law and International Financial Obligations Arising from Contract," in *Bibliotheca Visseriana*, II (1924), 1; Andreades, "Les Contrôles financiers internationaux," in *Recueil des cours*, V (1924), 5 [bibl.*]. See also H. Feis, *Europe, the World's Banker, 1870-1914* (1930), *passim*.
 57. Calvo developed his doctrine in *Derecho internacional teórico y práctico* (1868), I, § 136, and more elaborately in the later French editions of this work (*infra*, p. 245).
 58. The text of the declaration is found in Phillimore, *Commentaries upon International Law*, II (3rd ed., 1882), 9.
 59. *Infra*, p. 222.
 60. Stuyt, *Survey of International Arbitrations, 1794-1938* (1939), a most helpful collection of data; Ralston, *International Arbitration from Athens to*

Locarno (1929); Lammasch, "Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange," in *Handbuch des Völkerrechts*, V, Part 2 (1914), 23; Lapradelle and Politis, *Recueil des arbitrages internationaux*, I (1905), for 1798-1855, and II (1923), for 1856-1872; Moore, *History and Digest of the Arbitrations to Which the United States Has Been a Party* (6 vols., 1898). Lists of arbitration treaties with statistical data are found in Fried, *Handbuch der Friedensbewegung*, I (1911), 188, 191.

61. Grover Cleveland, *The Venezuelan Boundary Controversy* (1913).

62. Cf. Schoenrich, "The Venezuela-British Guiana Boundary Dispute," *Amer. Journ. Int. Law*, XLIII (1949), 523; Child, "The British Guiana boundary arbitration," *Amer. Journ. Int. Law*, XLIV (1950), 682; Dennis, "The Venezuela-British Guiana boundary arbitration of 1899," *Amer. Journ. Int. Law*, XLIV (1950), 720; Nussbaum, "Frederic de Martens: Representative Tsarist Writer on International Law," *Nordisk Tidsskrift for International Ret*, XXII (1952), 58.

63. See Feller, *The Mexican Claims Commissions, 1923-1934* (1935), 3; Moore, *op. cit.*, II, 1209.

64. Cf. Martens, *Nouveau recueil*, 2nd Ser., I, 651, art. 16.

65. The facts are presented by Hudson and Sohn, "Fifty Years of Arbitration in the Union of International Transport by Rail," in *Am. Journ. Int. Law*, XXXVII (1943), 597. There was, however, no official "Union" title.

66. M. O. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943) §§ 2 ff., with references.

67. Hudson, *op. cit.*, 42; L. Moreno, *Historia de las relaciones interestatales de Centroamérica* (1928), 179 ff.

68. Hambro, *L'Exécution des sentences internationales* (1936), 11 f. The cases call for closer examination.

HUMANIZATION OF WARFARE

69. Martens, *Nouveau recueil*, V (1824), 540.

70. M. Gumpert, *Dunant: The Story of the Red Cross* (1938). From the excellent biographical note by Norman H. Davis to Dunant, *A Memory of Solferino* (American Red Cross ed., 1939), a few phrases have been borrowed in the above text. The most valuable research on Dunant done so far is that of the Genevan A. François, *Le Berceau de la Croix rouge* (1918) and "Un Grand Humanitaire, Henri Dunant," in *Revue internationale de la Croix rouge*, March, 1928. The same author's *Henri Dunant: Sa vie et son œuvre* (1928), was not available to the writer. Unfortunately, M. François has a tendency to neglect information which he erroneously believes might impair the memory of his hero. Dunant's later life needs further investigation.

71. Namely, to a circular letter issued in 1863 from Berlin by Dunant and the Dutch physician Basting.

72. Lüders, *Die Genfer Konvention* (1876); section "Die Genfer Konvention von 1864" in Holtzendorff's *Handbuch des Völkerrechts*, IV (1889), 290; Moynier, *La Croix rouge: Son passé et son avenir* (1882).

73. American Association of the Red Cross, *History of the Red Cross* (1883).

74. See Harley, *Francis Lieber: His Life and Political Philosophy* (1899); the warm-hearted narrative by Hugo Preuss, the later draftsman of the Weimar Constitution, *Franz Lieber: Ein Bürger zweier Welten* (1886); Freidel, *Francis Lieber, Nineteenth-Century Liberal* (1948). On Lieber's significance for international law, cf. Elihu Root, "Francis Lieber," *Amer. Journ. Int. Law*, VII (1913), 453. In

1861–1862, after the outbreak of the Civil War, Lieber had given at Columbia University a course on the law and usages of war. The text of the General Order No. 100 is found in Lieber, *Miscellaneous Writings* (1881), II, 245.

75. The General Order was in part applied by the German army in the war with France, and it played an important role in the Brussels and Hague conferences (cf. Elihu Root, *loc. cit.*).

76. See n. 56 to chap. ii.

77. Namely, with the effect of the outbreak of war on enemy merchantmen; with the conversion of merchantment into men-of-war; with the laying of automatic submarine contact mines; with naval bombardments, which were subjected to restrictions on the model of the Law of War on Land; and with the right of capture in maritime war.

78. Ratification of the Porter Convention and of the amendments to the Convention on the Pacific Settlement of International Disputes was more limited.

WORLD WAR I

79. The main legal inquiry into the events of World War I is Garner, *International Law and the World War* (2 vols., 1920); unfortunately, the time of the preparation of the work was too close to the war atmosphere to make a detached appraisal possible. The German viewpoint is presented carefully and at length by *Völkerrecht im Weltkriege* (International Law in the World War, 4 vols., 1927), an official report based on an investigation made by a Committee of Inquiry (*Untersuchungsausschuss*) of the German Reichstag. The democratic representative, Professor Schücking, who later became a judge in the Permanent Court of International Justice, gaining much praise for his objectivity, was an active member of the Committee. Worth-while comment on this important material has not been forthcoming from the Allied or any other side. Meanwhile, judgment must be held in abeyance on many points. In an inquiry into the maritime aspects of World War I, admirable independence of judgment is shown by Alcide Ebray, *Chiffons de Papier* (1926), 177. See also Turlington, *The World War Period* (1936—Vol. III of *Neutrality: Its History, Economics, and Law*, ed. by Philip C. Jessup); "Weltkrieg und Völkerrecht" (several authors) in Strupp, *Wörterbuch des Völkerrechts und der Diplomatie*, III (1929).

80. Cf. Fenwick, *International Law* (3rd ed., 1948), 641; Oppenheim, II, §§ 319a, 390a, with references.

81. To this extent Germany offered to make reparations. Dept. of State, *Foreign Relations*, 1916 Supp., 157.

82. Details are given by R. Fuchs, *Die Grundsätze des Versailler Vertrages über Beschlagnahme deutschen Privatmögens im Auslande* (1927), 4, quoting non-German authors.

DOCTRINE OF INTERNATIONAL LAW: POSITIVIST TRENDS

83. The most passionate and radical representative of this school of thought was probably the Baltic German, Bergbohm. See his *Jurisprudenz und Rechtsphilosophie* (1892) and his thesis, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Dorpat, 1876).

84. J. Austin, *The Province of Jurisprudence Determined* (1832—an outline was published in 1831); *Lectures on Jurisprudence* (posthumous, 1861). On Austin's

views concerning international law see Walz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (1930), 56, 184 [bibl.*]. Generally on Austin's theories: Austin, *The Austinian Theory of Law*, ed. W. Jethro Brown (1931); Eastwood and Keeton, *The Austinian Theories of Law and Sovereignty* (1929); Hearnshaw, "John Austin and the Analytical Jurists," in Hearnshaw, ed., *The Social and Political Ideas of Some Representative Thinkers of the Age of Reaction and Reconstruction 1815-65* (1932), 158.

85. *Die rechtliche Natur der Staatenverträge* (1880).

86. Triepel restated his theory more briefly in "Les Rapports entre le droit interne et le droit international," *Recueil des cours*, I (1925), 77.

87. Among Triepel's most prominent followers one may mention the Italian Anzilotti (*Corso di diritto internazionale*, 3rd ed., 1928); his differences from Triepel are secondary and questionable.

88. Visscher, "La Codification du droit international," *Recueil des cours*, VI (1925), 329. The topic has inspired a disproportionate amount of writing. See, e.g., Oppenheim, I, before § 30.

89. Cf. von Holtzendorff, J. C. Bluntschli und seine Verdienste um die Staatswissenschaften (1882); Rivier, *Rev. dr. int.*, XIII (1881), 612.

90. *Infra*, p. 244.

91. Mention should be made of Fiore's *Il Diritto internazionale e la sua sanzione giuridica* (1890) and its 5th ed. (1915), *Il Diritto internazionale codificato*, transl. by Borchard as *International Law Codified and Its Legal Sanction* (1918).

SPECULATIVE TRENDS; PRIVATE INTERNATIONAL LAW

92. Telders, *Staat en Volkenrecht* (thesis, Leiden, 1927); Hegel, *Philosophy of Right*, transl. T. Knox (1943), 212. Trott zu Solz, *Hegels Staatsphilosophie und das internationale Recht* (1932), is inadequate.

93. Lasson, *Prinzip und Zukunft des Völkerrechts* (1871) and to some extent E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus sic stantibus* (1911). Still, Hegel was no authority to the adepts of national socialism, see Sabine, *A History of Political Theory* (rev. ed., 1950), 878.

94. This old chair (D'Irsay, *Histoire des universités françaises et étrangères*, II, 1935, p. 131) had been revived for Lorimer. See "James Lorimer," in *Dictionary of National Biography*.

95. Two volumes, abridged and translated by Nys (*Principes de droit international*, 1885); as to some points, Lorimer's *Institutes of Law* (1880) must be consulted. Lorimer's Preface to Nys's translation and his *Studies, National and International* (posthumous, 1890), 148 ff., may serve as introduction to his system.

See Rolin-Jaequemyns, "Les Principes philosophiques du droit international," in *Rev. dr. int.* (1885), 517, and (1886), 49; Pearce-Higgins, "La Contribution de quatre grands juristes britanniques au droit international," in *Recueil des cours*, XL (1932), 5; "James Lorimer" in *Ency. Soc. Sc. and Dictionary of National Biography*.

96. This applies also to his arguments against the doctrine of equality of states, though he was probably the first writer to oppose it vigorously. The doctrine has remained controversial since then.

97. Particularly Nys. See n. 95.

98. McIlwain, *Political Works of James I* (1918), xci. Lorimer had special praise for Suárez.

99. The outstanding example of this type of literature would seem to be Bagehot, *Physics and Politics* (1872).

100. Beales, *The History of Peace; A Short Account of the Organised Movements for International Peace* (1931); Norman Angell, "Pacifism," and "Peace Movements," in *Ency. Soc. Sci.*; Lange, "Histoire de la doctrine pacifique," etc., in *Recueil des cours*, XIII (1926), 175.

101. The word "pacifism" is not found in Murray's *New English Dictionary on Historical Principles* (1901).

102. *Della nazionalità come fondamento del diritto dei genti*.

103. Mancini's main studies on international law, including the Inaugural Lecture of 1851, are collected in his *Diritto internazionale* (1873); on multipartite treaties, his article in *Journal du droit international privé* (1874), 221, 285. Cf. Sereni, *The Italian Conception of International Law* (1943), 160, and Levi, "Mancini," in *Ency. Soc. Sc.*, both with references.

104. *System des heutigen römischen Rechts*, Vol. VIII (1849), transl. by Guthrie under the title *Private International Law* (1880). Cf. Gutzwiller, *Der Einfluss Savignys auf die Entwicklung des internationalen Privatrechts* (1923).

105. Cf. Nussbaum, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws," in *Columbia Law Review*, XLII (1942), 189.

SYSTEMATIC TREATISES; ORGANIZATION OF LEARNING

106. Critical surveys of the literature of the earlier nineteenth century on international law are found in von Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, I (1855), 337, and Rivier, "Literarhistorische Uebersicht der Systeme und Theorien des Völkerrechts seit Grotius," in Holtzendorff's *Handbuch des Völkerrechts*, I (1885), 395 (transl. Holtzendorff and Rivier, *Introduction au droit des gens*, 1889, p. 349). Lists of treatises in Oppenheim, I, § 58, and in von Liszt, *Das Völkerrecht* (12th ed., 1925) 81.

Only the representative treatises of the period have been surveyed in the following text, but opinions regarding the proper selection may differ. As other textbook writers widely known outside their countries we may mention Rivier (Swiss), whose *Lehrbuch des Völkerrechts* (1889) was translated as *Les Principes du droit des gens* (1896), and John Westlake, whose *International Law* (1904-1907) was translated as *Traité du droit international* (1924).

107. Count Kamarowski, "De la littérature contemporaine du droit international en Russie," in *Rev. dr. int.*, VIII (1876), 386 n.

108. A comprehensive and critical appraisal of Klüber's works is found in von Mohl, *op. cit.*, II (1856), 473. See also La Pradelle, *Maîtres et doctrines du droit des gens* (2nd ed., 1950), 183. La Pradelle's brilliant sketches cover many great and some other authors in international law. Unfortunately, selection and appraisal are too much influenced by personal sentiment and are expressed too much in glittering eulogy.

109. *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*.

110. The twelfth (posthumous) edition of 1925 did not preserve the spirit of the original work.

111. In 1917 von Liszt also published a pamphlet, *Vom Staatenverband zur Völkergemeinschaft* (cover title, *Vom Völkerbund zur Staatengemeinschaft*), advocating democratic methods in foreign policies. As a former disciple of von Liszt, the present writer may be permitted to testify to the enduring inspiration that

sprang from the teaching and the deeply humane personality of that great scholar who, as a democrat, was conspicuously ill-treated by his government.

112. *Trattato di diritto internazionale pubblico*. See also n. 91, preceding.

113. See Yepes, "La Contribution de l'Amérique Latine au développement du droit international public et privé," *Recueil des cours*, XXXII (1930), 679.

114. Reeves, "The First American Treatise on International Law," in *Amer. Journ. Int. Law*, XXXI (1937), 697; von Kaltenborn, *Kritik des Völkerrechts* (1847), 115; von Mohl, *op. cit.*, I, 399. Elizabeth Feaster Baker, *Henry Wheaton, 1785-1848* (1937), gives his *Elements* very scant and unsatisfactory consideration.

115. *Infra*, p. 291.

116. It is true, in the later editions very little is left of Wheaton's original.

117. On Hall, see Holland in *Law Quarterly Review* (1895), 113, and Pearce-Higgins, "La Contribution de quatre grands juristes britanniques, etc.," in *Recueil des cours*, XL (1932), 44.

118. Laserson, *Russia and the Western World* (1945), 123.

119. *Ibid.*, 133.

120. K. Nevolin gave a short outline of Grotius' teachings in *Encyclopediya Zakonovedenia* (Encyclopedia of Jurisprudence—Kiev, 1839), and V. Gorovtsev translated some parts of *De jure belli ac pacis* in *Mezhdunarodnoe Pravo: Izbrannaya Literatura* (International Law: Selected Literature—St. Petersburg, 1909), according to information the present writer received from the late Prof. Max M. Laserson, once instructor at the University of St. Petersburg. In 1948 the Russian government published a Russian translation of the Prolegomena and of Book I. During the reign of Peter the Great a manuscript translation was prepared, apparently for his son Alexis. See Ter Meulen and Diermanse, *Bibliographie des écrits imprimés de Hugo Grotius* (1950), nos. 673, 674.

121. Cf. De Martens' treatise (German ed.), I, 176; Kamarowski, "De la littérature contemporaine, etc., en Russie," in *Rev. dr. int.*, VIII (1876), 385. According to Prof. Oliver Lissitzyn of Columbia University, Kozhenikow in *The Russian State and International Law*, and *International Law*, a textbook (both in Russian, 1947), tries to show that important work on international law has been done in Russia since the time of Peter the Great. The instances given are unconvincing, the principal one being Mahnowsky, *Considerations of War and Peace* (1793 and 1797, in Russian), which was extensively summarized and reviewed by Professor Katschenoffsky in *Herald of Peace* (London), Series IV (1858), 71 f. Mahnowsky's study appears to be a rather trivial denunciation of war, describing the blessings of peace and lacking any legal interest.

122. Cf. Nussbaum, "Frederic de Martens, Representative Tsarist Writer on International Law," *Nordisk Tidsskrift for International Ret*, XXII (1952), 51. It seems that the Russian writer was not a relative of G. F. von Martens.

123. On his conduct in the Venezuelan boundary case, *supra*, p. 219.

124. See Oppenheim, I, §§ 58, 62.

125. Lorimer's chair in the University of Edinburgh was an exception—one which has perhaps contributed to the strange ways of the chair's incumbent.

126. Some pertinent data are given in *Annuaire de l'institut de droit international*, II (1878), 344, and von Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), 123. See also the next note.

127. On the early teachings of the law of nations in the United States see Hudson in *Proceedings of the Third Conference of Teachers of International Law* (1928), 69. Cf. also Haddow, *Political Science in American Colleges and Universities, 1636-1900* (1939).

128. H. W. Halleck, *International Law* (1861). See "H. W. Halleck," in *Encyclopedia Americana*.

129. C. H. Stockton, *A Manual of International Law for the Use of Naval Officers* (1911); *Outlines of International Law* (1914). See "Stockton" in *The Americana Annual* (1925).

CHAPTER VII

FROM THE TREATY OF VERSAILLES TO WORLD WAR II

THE PEACE TREATIES AND THEIR SEQUELS

1. The topics of this chapter coincide largely, though from a different angle, with those discussed in the familiar treatises on international law. To this extent, reference for bibliographical data may be made here to Oppenheim and, regarding German publications, to von Liszt, *Völkerrecht* (12th ed. by Fleischmann, 1925). General information is furthermore found in the excellent works of Toynbee, *Survey of International Affairs* (20 vols., 1920-1938, plus 13 vols. of documents), and Hudson, ed., *International Legislation* (7 vols., 1931-1941).

2. Harley Notter, *The Origins of the Foreign Policy of Woodrow Wilson* (1937), 43, 359, 374; Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (1936), 215; Bleiber, *Die Entstehung der Völkerbundsatzung* (in *Handbuch des Völkerrechts*, IV [1939], 1A), sharply critical of President Wilson; Wehberg, "Die Methode der Vorbereitung des Völkerbundes," *Friedens-Warte* (1939), 177. On leaguelike notions in German history, Veit Valentin, *Die Geschichte des Völkerbundsgedankens in Deutschland* (1920). The history of the League itself has now been told by F. P. Walton: *A History of the League of Nations* (2 vols., 1952).

The Colombian jurist Yepes, in "La Contribution de l'Amérique Latine, etc.," *Recueil des cours*, XXXII (1930), 605, represents an agreement of Panama, signed in 1826 by Colombia, Central America, Peru, and Mexico but never ratified, as a precursor, and a superior one, of the Covenant of the League of Nations. At best, one might find in some provisions of the agreement a vague resemblance to rules of the Covenant, not to speak of the implications arising from the lack of ratification.

3. Under the leadership of Viscount Bryce, a statesman and scholar close to American thought. Cf. also Zimmern, *op. cit.*, 165.

4. For a first orientation, D. P. Myers, *Handbook of the League of Nations* (1935), and Göppert, *Organisation und Tätigkeit des Völkerbundes* (1938, in *Handbuch des Völkerrechts*, IV, 1B). Regarding the competences of the various organs of the League, see *Essential Facts About the League* 10th ed., rev. (1939), 65, 76.

5. When Poland in 1920 snatched Vilna from Lithuania by violence, the League was unable to secure redress for Lithuania. Toynbee, *Survey of International Affairs, 1920-1923* (1925), 250.

6. Gross, "Was the Soviet Union Expelled from the League of Nations?" *Am. Journ. Int. Law*, XXXIX (1945), 35.

7. Wambaugh, *The Saar Plebiscite* (1940), and "Control of Special Areas"—

in H. I. E. Davis, ed., *Pioneers in World Order* (1944); generally, Wambaugh, *Plebiscites Since the World War* (2 vols., 1933) [bibl.*].

8. Among other interesting matters of international law the subject is ably dealt with by Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the working of the Upper Silesian Settlement, 1922-1937* (1942).

9. See Oppenheim, I, §§ 340c and d.

10. See Macartney, *National States and National Minorities* (1934), 370;

J. Robinson and others, *Were the Minorities Treaties a Failure?* (1943).

11. Regarding the limitation of naval armaments, *infra*, p. 266.

12. On the meager implementation of the Resolution, see W. W. Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935), 517. The Inter-American Antiwar Pact of 1933 (*infra*, p. 261) adopted the Stimson Doctrine.

13. League of Nations, *The Mandates System: Origin, Principles, Application* (1945); P. Q. Wright, *Mandates Under the League of Nations* (1930).

14. Sheldon Glueck, *War Criminals, Their Prosecution and Punishment* (1944), 19.

15. There were no earlier precedents. *Supra*, p. 320, n. 3.

16. W. M. Hill, *The Economic and Financial Organization of the League of Nations* (1946); Sweetser, "The Non-Political Achievements of the League," in *Foreign Affairs*, XIX (1940), 179.

17. A helpful survey is League of Nations, *Signatures, Ratifications and Accessions in Respect of Agreements and Conventions Concluded under the Auspices of the League of Nations*, 21st list (V Legal, 1944, Vol. II). For supplementary information see the annual, *The League from Year to Year* (1926-1938).

18. Hudson and Feller, "The International Unification of Laws Concerning Bills of Exchange," in *Harvard Law Review*, XLIV (1931), 333; Hupka, *Das einheitliche Wechselrecht der Genfer Verträge* (1934).

19. Nussbaum, "Treaties on Commercial Arbitration: A Test of International Private Law Legislation," in *Harvard Law Review*, LVI (1942), 219, 221.

20. Myers, "The League Loans," *Political Science Quarterly*, LX (1945), 492.

21. *Infra*, p. 272.

22. The Conference adopted three draft agreements on narrow points of double nationality, statelessness, and conflicts of nationality laws. Few states ratified; the only Great Powers among them were Great Britain and, in one case (regarding certain points of double nationality), the United States. League of Nations, *Treaty Series*, CLXXVIII, 229, and CLXXIX, 90, 116.

23. Aufricht, *Guide to League of Nations Publications* (1951).

24. Myers, *op. cit.*, 388.

25. F. G. Wilson, *Labor in the League System: A Study of the International Labor Organization in Relation to International Administration* (1934); Shotwell, ed., *The Origins of the International Labor Organization* (2 vols., 1934); Lowe, *The International Protection of Labor* (1935).

26. Cf. the statement of the Soviet delegate in *International Labour Conference, 19th Session, Records of Proceedings* (1935), 549.

27. International Labour Office, *International Labour Code, 1939: A Systematic Arrangement of the Conventions and Recommendations Adopted by the International Labour Conference, 1919-1939* (1941). (The Code was remodeled in 1951.) Only two of the draft conventions were adopted by the United States: the Officers' Competency Certificates Convention and the Shipowners' Liability (Sick and Injured Seamen) Convention, both of 1936. U.S. *Treaty Series*, Nos. 950, 951.

28. See Pribram, "The ILO: Present Functions and Future Tasks," in *Foreign Affairs*, XXI (1942), 158.

29. Nussbaum, *Das Ausgleichsverfahren des Versailler Vertrages* (1923—transl., 1923, as *La Procédure de vérification et compensation*).

30. E. L. Dulles, *The Bank for International Settlements at Work* (1932); Schlüter, *Die Bank für internationalen Zahlungsausgleich* (1932), and other publications listed by Nussbaum, "International Monetary Agreements," in *Amer. Journ. Int. Law*, XXXVIII (1944), 253, n. 65.

31. See, e.g., Schwarzenberger, "The Bank for International Settlements, etc.," in *Modern Law Review*, III (1939), 150; *Parliamentary Debates (Commons)*, May 26, 1939, p. 2703.

INTERNATIONAL-LAW DEVELOPMENTS NOT CONNECTED WITH THE PEACE TREATIES

32. *Supra*, p. 190. Cf. Pan American Union, *Report on the Activities of the Pan American Union*, 1923-1927; *idem*, 1928-1933 and 1933-1938; also, *Summary of Annual Report of the Director of the Pan American Union*, 1938-1939 and later years. In 1945 the name of the International Union of American Republics was changed to Inter-American System, while the title of the secretariat, Pan American Union, remained unchanged. (Use of the latter term for the association of the governments is convenient though not strictly correct.) A helpful survey is found in Fenwick, *International Law* (3rd ed., 1948), 202.

33. For a complete list of the inter-American conventions and their ratifications, see *Amer. Journ. Int. Law*, XXXII (Supp. 1938), 102. Argentina's almost complete abstention is remarkable. See also *supra*, pp. 213, 228, and n. 47 following. The more important of the conventions are reprinted and analyzed by Savelberg, *Le Problème du droit international américain* (1946).

34. *Infra*, p. 268.

35. Regarding inter-American agreements on arbitration and conciliation, see p. 274.

36. Snyder, "Commercial Policies as Reflected in Treaties from 1931 to 1939," in *American Economic Review* (1940), 787; League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (1942, II, A. 6).

37. See Farra, *Les Effets de la clause de la nation la plus favorisée et la spécialisation des tarifs douaniers* (thesis, Paris, 1910).

38. See, e.g., Dietrich, *World Trade* (1939), 249.

39. Cf. Nussbaum, *Money in the Law: National and International* (1950), § 35.

40. League of Nations, *Quantitative Trade Controls: Their Causes and Nature* (1943, II, A. 5); U.S. Temporary National Economic Committee, Monograph No. 40: *Regulation of Economic Activities in Foreign Countries* (1941); Snyder, "The Most-Favored-Nation Clause and Recent Trade Practices," in *Political Science Quarterly* (1940), 77.

41. Cf. Snyder, *op. cit.*, 793.

42. Tasca, *The Reciprocal Trade Policy of the United States* (1938); Diebold, *New Directions in Our Trade Policy* (1941); U.S. Tariff Commission, *Commercial Treaties and Agreements in Force October 1, 1939* (1939, mimeographed).

43. The number increased during World War II and after.

44. International Labor Office, *Intergovernmental Commodity Control Agreements* (1943); Oppenheim, I, § 581.

45. Private international cartels are outside the scope of the present inquiry. Some information about their legal aspects is found in Demay, *La Condition juri-*

dique des cartels internationaux (1935); Macassey, "Controlling Cartels Under the Rule of Law," *Transactions of the Grotius Society*, XXXI (1946), 232; Dörinkel, *Internationales Kartellrecht* (1932); only French material is contemplated by Picard, "Les Ententes, libres ou obligatoires, de producteurs sur le plan national et sur le plan international," *Recueil des cours*, LXVII (1939), 539.

46. See Oppenheim, II, § 25 i.

47. Argentina was again an exception.

48. Cf. Taracouzio, *The Soviet Union and International Law* (1935), 327, 423.

49. For the text of the agreement see *Amer. Journ. Int. Law*, XXXI (Supp. 1937), 137.

50. On the following cf. Fenwick, *International Law* (3rd ed., 1948), 613, 618; Oppenheim, II, §§ 292 *a et seq.*

51. The Kellogg Pact was invoked in the same sense. Fenwick, *op. cit.*, 617; Oppenheim, II, § 292 *h, i.*

52. Mussolini did not recognize the existence of a legal basis for sanctions. He reacted with "antisanctionist" decrees.

53. Especially in 1936 by the convention of Buenos Aires (*infra*, p. 274). Fenwick, *op. cit.*, 616.

INTERNATIONAL DISPUTES AND JUDICIAL ORGANIZATIONS

54. Leading: M. O. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943) [bibl.*], and *International Tribunals, Past and Future* (1944) [bibl.*]. Ample bibliographical and statistical material is found in *Publications of the Permanent Court of International Justice, Series E, Annual Reports*, especially No. 15 (1938-1939), the latest one.

55. *Supra*, pp. 74, 137, 221.

56. For details, see Hudson, *The Permanent Court, etc.*, sec. 463, p. 477, and *International Tribunals, etc.*, 141. The text of the cases and opinions is found in the *Publications of the Permanent Court, Ser. A/B.*

57. Hudson, *The Permanent Court*, chap. xx, p. 435, and *International Tribunals*, 10.

58. See Schindler, *Die Schiedsgerichtsbarkeit seit 1914* (1938—*Handbuch des Völkerrechts*, V, Abt. 3), a careful and greatly informative study. Pertinent cases in *Annual Digest of Public International Law Cases* (since 1932—edited by Lauterpacht).

59. See *Amer. Journ. Int. Law*, XXX (1936), 502; Schindler, *op. cit.*, 23. Cf. also entry "Jakob-Salomon" in *New York Times Index* (1935).

60. P. B. Potter, *The Wal Wal Arbitration* (1938).

61. *Supra*, p. 261.

62. See Garner, "The Senate Reservations to the Inter-American General Treaty of Arbitration," in *Amer. Journ. Int. Law*, XXXVI (1932), 333.

63. Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean* (1941), 68.

64. Feller, *The Mexican Claims Commissions, 1923-1934* (1935).

65. Blühdorn, "Le Fonctionnement et la jurisprudence des tribunaux arbitraux mixtes," in *Recueil des cours*, XLI (1934), 141; Schätzel, "Die gemischten Schiedsgerichte der Friedensverträge," in *Jahrbuch des öffentlichen Rechts*, XVIII (1930), 378; Kiesselbach, *Probleme und Entscheidungen der deutsch-amerikanischen Schadens-Kommission* (1927). Further references in Stuyt, *Survey of International Arbitrations* (1939), No. 350. Many decisions of the Mixed Arbitral

Tribunals are collected in *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (10 vols., 1922-1930).

66. Schätzel, *op. cit.*, 449.

67. A striking instance in "Direkte Schuldenregelungen vor der Friedensratifikation," in *Zeitschrift für internationales Recht*, XXX (1922), 1.

68. He was, it seems, similarly successful as the sole arbitrator in an American-Austrian-Hungarian Commission. Borchard, *Amer. Journ. Int. Law*, XXX (1936), 139.

DOCTRINAL DEVELOPMENT; ORGANIZATION OF LEARNING

69. For a general orientation, see Lauterpacht, *The Function of Law in the International Community* (1933), 399; Brierly, "Le Fondement du caractère obligatoire en droit international," in *Recueil des cours*, XXIII (1928), 467; Walz, *Völkerrecht und staatliches Recht* (1933); and the penetrating analysis by W. Schiffer, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur* (1937).

70. A careful, copiously documented survey is presented in Scheuner, "Naturrechtliche Strömungen im heutigen Völkerrecht," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, XIII (1951), 556. Erich Cassirer, *Natur- und Völkerrecht im Lichte der Geschichte und systematischen Philosophie* (1919) is of little significance.

71. Among the representatives of this group may be mentioned Cathrein (S.J.), *Die Grundlage des Völkerrechts* (1918); Ottenwälder, *Zur Naturrechtslehre des Hugo Grotius* (1950—see *infra*, p. 304); Le Fur, "La Théorie du droit naturel depuis le XIII^e siècle et la doctrine moderne," *Recueil des cours*, XVIII (1927), 263; Höffner, *Christentum und Menschenwürde* (1947); Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts* (1949); Stadtmüller, *Geschichte des Völkerrechts* (1951); and practically all the recent Spanish writers—see *infra*, p. 284. The term *néo-scholastique* has been particularly applied to Le Fur's doctrines.

72. This feature is conspicuous in Stadtmüller, *op. cit.*—e.g., p. 71.

73. *Die moderne Staatsidee* (1919—transl. with a copious Introduction by Sabine and Shephard under the title, *The Modern Idea of the State* [1927]). See also "L'Idée moderne de l'état," in *Recueil des cours*, XIII (1926), 513.

74. *Traité de droit constitutionnel*, Vol. I (3rd ed., 1927), secs. 17, 67; "Objective Law," in *Columbia Law Review*, XX (1920), 817, XXI (1921), 17, 126, 242. Cf. Gidynski, "Duguit's Sociological Approach to the Bases of International Law," in *Iowa Law Review* XXXI (1946), 599; Scelle, "La Doctrine de Léon Duguit et les fondements du droit des gens," in *Archives de philosophie du droit et de sociologie juridique* (1932), 83 (this volume of the *Archives* contains some other articles on Duguit, touching upon the present discussion); Réglade, "Perspectives, etc.," in *Revue générale du droit international public* (1930), 381. The chapter on Duguit in Chan Nay (Ch'ên Nei) Chow, *La Philosophie du droit international en France depuis le XVI^e siècle* (thesis, Paris, 1940), is of lesser value.

75. Among Duguit's followers the most prominent is probably Georges Scelle, who presents an even more pronounced biological approach in "Règles générales du droit de la paix," *Recueil des cours*, XLVI (1933), 331, and "La Doctrine de Léon Duguit, etc.," *Archives de philosophie du droit et de sociologie juridique* (1932), 80. On Scelle's theory see Savelberg, *Le Problème du droit international américain* (1946), 23 f.

76. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*

(1928), *Reine Rechtslehre* (1934), 34, and *General Theory of Law and State* (1945), 328. See Lauterpacht, "Kelsen's Pure Science of Law," in *Modern Theories of Law* (1933), 105; Kunz, "The 'Vienna School' and International Law," in *New York University Law Quarterly Review*, XI (1934), 370; Jones, "The 'Pure' Theory of International Law," in *Br. Yr. Bk. Int. Law* (1935), 5; Stern, "Kelsen's Theory of International Law," *Amer. Political Science Review*, XXX (1936), 736.

77. See bibliography in Kelsen, *General Theory, etc.*, 454, 458.

78. A revised edition in three volumes was published in 1945.

79. Wharton, *A Digest of the International Law of the United States* [sic] *Taken from Documents Issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys General* (3 vols., 2nd ed., 1887) belongs to the same school of thought, but is more a collection of materials than an analytical treatise. The same may be said of J. B. Moore's celebrated *A Digest of International Law* (8 vols., 1906), continued by Hackworth, *Digest of International Law* (8 vols., 1940-1944). H. A. Smith, ed., *Great Britain and the Law of Nations* (2 vols., 1932-1935), though to some extent a counterpart, is more selective and more explanatory.

80. See Oppenheim, I, § 62.

81. Cf. Nussbaum, "Lorenz von Stern on International Law and International Administration," in *Festschrift für Professor Lewald* (Basle, 1953).

82. Brierly, *Law of Nations* (Oxford, 1928), and Fenwick, *International Law* (New York, 1924), may be taken as typical in this respect. Both books have since gone through several editions.

83. *Le Droit international américain* (Paris, 1910). See also La Pradelle, *Maîtres et doctrines, etc.* (2nd ed., 1950), 423.

84. Yepes, "La Contribution de l'Amérique Latine, etc.," *Recueil des cours*, XXXII (1930), still extols Latin American achievements, but he seems not to insist on Alvarez' theory. A balanced appraisal of that theory is found in Savelberg, *Le Problème du droit international américain* (1946).

85. Walz (National Socialist), *Völkerrechtsordnung und Nationalsozialismus* (1942); Bristler (pseudonym for J. H. Herz), *Die Völkerrechtslehre des Nationalsozialismus* (1938); Fournier, *La Conception national-socialiste du droit des gens* (thesis, Paris, 1938); Florin and J. H. Herz, "Bolshevist and National-Socialist Doctrines of International Law," in *Social Research* (1940), 1; Gott, "The National-Socialist Theory of International Law," in *Amer. Journ. Int. Law*, XXXII (1938), 704.

86. Of October 6, 1935. Hitler, *Speeches, April, 1922, to August, 1939*, ed. Baynes (1942), I, 913.

87. Carl Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte* (1939—4th ed., *Grossraumordnung*, 1941), and "Raum und Grossraum in Völkerrecht," in *Zeitschrift für Völkerrecht*, XXIV (1941), 145. As late as 1930 Schmitt had praised the Weimar Constitution and its Jewish draftsman Professor Hugo Preuss in his essay, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre*. Under Hitler, however, he grossly vilified Germany's Jewish legal scholars in toto, stating in conclusion: "By keeping off the Jews, says our Führer Adolf Hitler, I am fighting for the work of the Lord" (*Deutsche Jur. Ztg.*, 1936, 499).

88. See Walz, "Inflation im Völkerrecht der Nachkriegszeit," in *Zeitschrift für Völkerrecht* (1939), Supp.

89. Cf. Sereni, *The Italian Conception of International Law* (1934), 269.

90. Garcia Arias, appendix to Nussbaum, *Historia del derecho internacional*

(Madrid, 1950), 517 ff., 393 ff., 435 ff., presents a most impressive bibliographical survey (including the pre-totalitarian period).

91. The Consejo superior de investigaciones científicas.

92. *Revista española de derecho internacional*.

93. A few attempts under the monarchy to organize such periodicals had soon broken down (Garcia Arias, *op. cit.*, 532).

94. For instance, in 1950 Professor Caamaño Martinez published a volume, *El Pensamiento jurídico-político de Carl Schmitt*, enthusiastically reviewed by the leading internationalist of the school, Professor Barcia Trelles, in *Revista española de derecho internacional*, III (1951), 1011. (The latter's *Puntos cardinales de la política internacional española* was published by the Falangist Press- and Propaganda-Department in *The Year of Victory*, 1939). The monumental Volume II of the *Revista* (1240 pages) begins with an article by Schmitt. Elsewhere in the *Revista* a study is devoted to a "concepto schmittiano," and one book and a pamphlet by Schmitt are reviewed at length by Professor Isabarne, who asserts that Schmitt has "served forty years at the altar of legal science."

SOVIET DOCTRINE AND PRACTICE

95. R. Schlesinger, *Soviet Legal Theory* (1945); Hazard, "The Soviet Concept of International Law," *Proceedings of the American Society of International Law* (1939), 33; *idem*, "Cleansing Soviet International Law of Anti-Marxist Theories," *Amer. Journ. Int. Law*, XXXII (1938), 244, and book review, *ibid.*, XXXIX (1945), 617; *idem*, "The Soviet Union and International Law," *Illinois Law Rev.*, XLIII (1949), 591; Chakste, "Soviet Concepts of the State, International Law and Sovereignty," *Illinois Law Rev.*, XLIII (1949), 21, 29; Kulski, "Soviet Comments on International Law and International Relations," *Illinois Law Rev.*, XL (1946), 333; Shapiro, "The Soviet Concept of International Law," in Keeton and Schwarzenberger, eds., *Year Book of World Affairs* (1948), 272.

96. The Soviets left the situation in twilight. See Gsovski, *Soviet Civil Law*, I (1948), 309.

97. The treaties are listed in Taracouzio, *The Soviet Union and International Law* (1935), 450 (up to 1933), and *War and Peace in Soviet Diplomacy* (1940), 311 (topical index of Soviet agreements then in force); also in League of Nations, *Treaty Series, General Index*, Vol. VIII (up to 1938). See furthermore, Korovin, "Soviet Treaties and International Law," *Amer. Journ. Int. Law*, XXII (1928), 753, and Prince, "The U.S.S.R. and International Organizations," *ibid.*, XXXVI (1942), 425.

98. The Soviet explanation of that repudiation is found in U.S. Dept. of State, *Bulletin*, XII (1945), 811.

99. Nussbaum, "Treaties on Commercial Arbitration: A Test of International Private-Law Legislation," *Harvard Law Rev.*, LVI (1942), 219, 220.

100. The writer has dealt with this case at some length in "The Arbitration Between the Lena Goldfields, Ltd., and the Soviet Government," *Cornell Law Q.*, XXXVI (1950), 30.

101. Vyshinsky, ed., *The Law of the Soviet State* (1949), 235.

102. The 1945 repudiation of the Japanese treaty and the Lena Goldfields case are particularly illustrative because of the transparent character of the reasons alleged by the Soviets. More examples of Soviet violation of treaty obligations are gathered in *Background Information on the Soviet Union in International Relations*, 81st Cong., 2nd Sess., House Rep. No. 3135 (1950).

103. This idea, first suggested in Marx's Pleading before the Cologne Jury—transl. in *Labour Monthly*, II (1923), 174, 175—and inherent in his philosophy of historical materialism, has been elaborated by Soviet writers. Cf. R. Schlesinger, *Soviet Legal Theory* (1945), chap. ii; for pertinent quotations from Soviet writers, Gsovski, *op. cit.*, 152. See also Pashukanis, *Allgemeine Rechtslehre und Marxismus* (transl. from Russian, 1929).

104. Laserson, *Russia and the Western World* (1945), 130.

105. A translation in Taracouzio, *op. cit.*, 35.

106. Stalin's address of Feb. 9, 1946. See, e.g., *New York Times*, Feb. 10, 1946, p. 30, col. 2.

107. Taracouzio, *op. cit.*, 311. On later Soviet elaboration of that doctrine, cf. Lissitzyn, "Recent Soviet Literature on International Law," *American Slavic and East European Review* (1952), 264.

108. Korovin, *Das Völkerrechtswissenschaft der Uebergangszeit* (transl. 1929 from the 2nd Russian ed., of 1925), and "La République des soviets et le droit international," in *Revue générale de droit public international*, XXXII (1925), 292. Hrabar, "Das heutige Völkerrecht vom Standpunkte eines Sowjetjuristen," in *Zeitschrift für Völkerrecht*, XIV (1928), 188, analyzes Korovin's theories, quoting some statements omitted in the 2nd Russian ed. of his book, and gives data on the fate of Russian scholars of international law of the czarist period.

109. This amazing document has been reproduced in German translation by Makarov, "Völkerrechtswissenschaft in Sowjetrussland," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, VI (1936), 486.

110. Translated by Hazard, *Illinois Law Rev.*, "The Soviet Union and International Law," *Illinois Law Rev.*, XLIII (1949), 591, 592. Regarding a more recent version of Korovin's thesis see Hazard, *Amer. Journ. Int. Law*, XLVI (1952), 584.

111. Cf. Wilk, "International Law and Global Ideological Conflict," *Amer. Journ. Int. Law*, XLV (1951), 648.

APPENDIX

SURVEY OF THE HISTORIOGRAPHY OF INTERNATIONAL LAW

1. The following review omits a few minor accounts of the history of the law of nations. They are cited in Anzilotti, *Corso di diritto internazionale* (3rd ed., 1928), 1, and more fully in the 1929 German translation of this (*Lehrbuch des Völkerrechts*, 1). Historical surveys are also found in the treatises of F. de Martens, Oppenheim, Pradier-Fodéré, and others. Kohler's *Grundlagen des Völkerrechts* (1918), though often strangely capricious, makes some interesting points.

Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1919), is a learned and brilliant sketch; but, conceived as it is in terms of raised and disappointed hopes, it has an emotional quality that impairs its value. Hosack, *On the Rise and Growth of the Law of Nations from the Earliest Time to the Treaty of Utrecht* (1882), presents a haphazard and insufficiently documented narrative of events more or less connected with international law.

2. The book was continued by von Kamptz, *Neue Litteratur des Völkerrechts seit dem Jahre 1794* (1817).

3. For bibliographical data on Robert Ward see *Dictionary of National Biography* and Michaud, *Biographie universelle*.

4. Under the title *Histoire des progrès du droit des gens en Europe depuis la paix*

de Westphalie jusqu'au congrès de Vienne; the first English edition is of 1845. The work was reviewed by von Kaltenborn, *Kritik des Völkerrechts* (1847), 124; von Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, I (1855), 373, and at great length in the *Edinburgh Review* of April, 1843 (anonymous).

5. Also published as *Introduction au droit des gens*, by von Holtzendorff and Rivier (1889).

6. See Nys, "François Laurent: Sa vie et ses œuvres," in *Rev. dr. int.* (1887), 408; and Honigsheim's tribute to Nys's hundredth anniversary: "Ernest Nys," *Friedenswarte*, L (1951), 315.

7. *Etudes*, I, 318.

8. "Etude sur le développement historique du droit international dans l'Europe orientale," "Les Origines de l'arbitrage international," and "L'Apport de Byzance au développement du droit international occidental," *Recueil des cours*, XI (1926), 345, XLII (1932), 5, and LXVII (1939), 137.

9. Garcia Arias, appendix to Nussbaum, *Historia del derecho internacional* (Madrid, 1950), 359 ff. However, the study is more in the manner of a bibliography.

10. Van Eysinga, "Geschiedenis van de Nederlandsche Wetenschap van het Volkenrecht" (1950—Vol. III, Part 1, of K. Akademie van Wetenschappen, *Geschiedenis van de Nederlandsche Rechtswetenschap*).

11. See von Kaltenborn, *Kritik des Völkerrechts* (1847), 37; Rivier, "Literar-historische Uebersicht, etc.," in Holtzendorff's *Handbuch des Völkerrechts*, I (1888), 395; Nys, *Le Droit international*, I (1912), 224 ff.; Laurent, *Histoire de l'humanité*, X (1865), 477; Walker, *History of the Law of Nations* (1899), 334. Such references occur in systematic treatises on international law including Oppenheim-Lauterpacht, *International Law*, I (7th ed., 1947), 80, 87; von Liszt, *Das Völkerrecht* (11th ed., 1918), 13; F. de Martens, *Traité de droit international* (transl. from the Russian by Leó, 1883), I, 202; Despagnet and de Boeck, *Cours de droit international public* (4th ed., 1910), 31; Diena, *Diritto internazionale* (3rd ed., 1930), 61; Anzilotti, *Corso di diritto internazionale* (3rd ed., 1928), 7; Louter, *Le Droit international public positif* (transl. from the Dutch, 1920), I, 97; Calvo, *Le Droit international théorique et pratique*, I (5th ed., 1896), 32; Alcorta, *Cours de droit international public* (transl. from the Spanish, 1887), I, 389. Spanish authors have long followed the same line: Marqués de Olivart (the leading Spanish internationalist of his day), *Tratado y notas de derecho internacional público*, I (1887), 25, and Joaquin Marin y Mendoza, *Historia del derecho natural y de gentes* (1776)—surveyed by L. Garcia Arias, appendix to Nussbaum, *Historia del derecho internacional* (Madrid, 1950), 489; and, more recently, the legal historian Hinejosa in "Los Precursores españoles de Grotius," *Anuario de historia del derecho español*, VI (1929), 220. An exception to some extent is perhaps Pedro López Sánchez writing "con un carácter españolista y católica" in *Elementos de derecho internacional público* (1866, 1877) (see Garcia Arias, *op. cit.*, 499).

12. Nos. 2 and 4 will be cited respectively as *Spanish Origin* (1928) and *Spanish Origin* (1934).

13. For instance, to Scott the Roman Catholic Church is the Universal Church: *Spanish Origin* (1934), 265; Introduction to Grotius' *De Jure*, etc., xxx. He denominates non-Catholics generally as "those without the Church" (*Spanish Origin*, 265) and calls the Pope the head of Christendom and "in very fact the supreme moral authority in the Christian world" (*ibid.*, 124).

14. *Spanish Origin* (1928), 103.

15. *Ibid.*, 120.

16. *Spanish Origin* (1934), 247.

17. *Catholic Conception*, 325.

18. Cf. J. W. Allen, *A History of Political Thought in the Sixteenth Century* (1928), 305.

19. Referring to the fact that some Protestant sectarians withdrew from the Dutch East India Company because of the Malacca affair (*supra*, p. 102), Scott comments (Introduction to *Grotius' De Jure, etc.*, xix) that it cannot be doubted that "these men were sincere in their opposition to war, but it seems to be human nature to protest more strongly when the pocket book is affected." This scoffing remark is out of place, as the sectarians had decided to abandon profit: Fruin, "An Unpublished Work of Hugo Grotius," *Bibliotheca Visseriana*, V (1932), 32, 33 (Scott relies entirely on Fruin). In *Spanish Origin* (1934), 246, Henry VIII's insulting remarks on Luther are fully reprinted although this outburst of personal enmity (P. Smith, "Luther and Henry VIII," *Eng. Hist. Rev.*, XXV [1910], 656) had nothing whatever to do with the subject of Scott's work. For an ironical reference to an opinion of the Anglican Church, see *Spanish Origin* (1928), 105. Protestant prejudices against Catholics are referred to (*ibid.*, 110), but the reverse situation with respect to the heresy concept, etc., is nowhere considered.

20. He allowed this statement, made previously in a Montevideo conference, to be reprinted in *Spanish Origin* (1928), 10. In *Spanish Origin* (1935), 155, he comments on the reasons adduced by Vitoria in favor of the monopoly of Spanish trade with the Indians; namely, the Spanish protection of, and expenses for navigation (*supra*, pp. 81, 83). This argument, Scott says, "would in our day be called peculiarly American." He adds, however, that Vitoria used the argument "for a spiritual purpose." The contrast with his remarks on the Protestant sectarians, *supra*, n. 19, is striking.

21. *Infra*, n. 46.

22. *Spanish Origin* (1934), 248-252. The whole discussion is obscure.

23. *Catholic Conception*, 493.

24. *Spanish Origin* (1928), 103.

25. *Spanish Origin* (1934), 196, "Preface," 9a; similar phrases, e.g., *ibid.*, 145, 288, "Preface," 2a.

26. *Infra*, p. 303.

27. See, e.g., *infra*, pp. 298, 299, 302, nn. 32, 33.

28. Scott, apparently confusing *prima* and *primo*, is impressed by the fact that Vitoria was a *prima* professor at Salamanca. Again and again he repeats this title—"the *prima* professor, not only of theology, but of morality and law in all its branches" (*Spanish Origin* (1934), 214. But *prima* relates, in Spanish, principally to the early hours of the day. The *prima* professor taught during the day, the *vespera* professor, in the later afternoon. *Spanish Origin* (1934), 73.

29. Delos (O.P.), *La Société internationale et les principes de droit public* (1929), discussing at length the theories of the two theologians, finds them opposite to each other.

30. *Catholic Conception*, 327.

31. *Spanish Origin* (1934), 119.

32. A striking example is Vitoria's "De potestate civili," § 21, where the sentence, "jus gentium non solum habet vim ex pacto et conducto inter homines, sed etiam habet vim legis," is obscurely translated "that international law has not only the force of a pact and agreement among men, but also the force of a law," in *Spanish Origin* (1934), App. C. We are thus told that law is law. What Vitoria really means is that a violation of the *jus gentium* constitutes a sin, and a grave violation of it a mortal sin ("quod mortaliter peccant violentes jura gentium"). At variance with other theologians, who confine this view to the divine law of nature, he im-

parts here a feature of moral theology to the *jus gentium*. His view is connected with his conception of the whole world as one commonwealth (*supra*, p. 84), which appears from the cited passage of "De potestate civili." The meaning of *jus gentium* as universal law is obvious in this section, but Scott translates it invariably as "international law."

33. Scott and his translator render the term *princeps* in "De jure belli," § 7 ("Quis proprie dicitur princeps?" simply as "sovereign prince": *Spanish Origin* (1934), 205 and App. B, liii. On "sovereignty," see *supra*, p. 72. A counterpart, and a very bad one, is the translation of *monarcha* as "[spiritual] monarch" in "De potestate civili," § 14 (*supra*, n. 93 to chap. iv). That translation tries to veil Vitoria's idea on the complete subordination of the secular to the religious power. Another confusing feature is the ever recurring translation of *in foro conscientiae* as "court of conscience." This designation was used for the English courts of equity, whereas the Spanish scholastics were concerned with the question of the inner conscience—a difference nowhere mentioned by Scott. His readers may be easily led into assuming that the "court of conscience" is a legal institution and especially one concerned with questions of international law. See, e.g., *Spanish Origin* (1934), 219: Vitoria "haled before the court of conscience anybody and everybody who violated a law . . . of a state or the international community."

34. *Catholic Conception*, 31.

35. "De Indis," iii, 4, par. 2; *supra*, p. 81.

36. *Spanish Origin* (1935), 146.

37. "De Indis," iii, 5.

38. Cf. Gierke, *Genossenschaftsrecht*, II (1873), 579 ff., 720 ff.; Besta, "Cittadinanza (Historia)," in *Enciclopedia italiana*. See also *supra*, p. 326, n. 82.

39. He cited Cod. X, 40, § 7, which is obviously not in point, but he meant Cod. VII, 62, 11, as correctly stated by Scott, *Spanish Origin* (1934), 147 n. 4. However, the latter decree declares that *origo* (and some other facts, such as *manumissio*) "makes citizens" (*cives*), whereas the domicile "makes residents" (*incolas*). This gives no support to Vitoria's assertion; nor is it elsewhere borne out by the Roman sources. The Roman conception of *jus gentium* was entirely different in this matter. According to it, the newborn shares the status of the mother (e.g., in the case of a *peregrina* or a slave), whereas among Roman citizens the father's status was controlling. See Buckland, *A Textbook of Roman Law* (2nd ed., 1950), 99; Girard, *Manuel élémentaire de droit romain* (8th ed., by Senn, 1929), 117, 126; F. Schulz, *Prinzipien des römischen Rechts* (1934), 83.

40. *Spanish Origin* (1934), 147, 148.

41. See, e.g., Pollock and Maitland, *The History of English Law*, II (2nd ed., 1903), 458; Hyde, *International Law* (2nd ed., 1945), I, 343.

42. The reader is not even informed that the Latin texts of Vitoria's Readings, missing in *Spanish Origin*, can be found in the Nys edition.

43. *De Bello* (*supra*, p. 327, n. 98), V, 6.

44. *De triplici virtute theologica: De fide*, Disputatio XVIII, sec. 1, § 5 (6). This disputation is concerned with the means for the conversion of unbelievers.

45. Suárez mentions elsewhere the significance of the just-war concept for the sale of arms to belligerents: *De Bello*, VI, 11 (A).

46. *Catholic Conception*, 458.

47. *De Bello*, V, 8.

48. *Catholic Conception*, 458.

49. *De legibus ac deo legislatore*, vii, ch. 9 (14).

50. *Catholic Conception*, 227.

51. *Op. cit.*, 182.

52. In the Introduction to *Selections from Three Works of Suárez*, this view is somewhat modified.

53. *Catholic Conception*, 178.

54. This is true especially of the *Selections from Three Works of Suárez*. Comprising more than 1,200 quarto pages and published by the Carnegie Endowment, they contain the full text of Suárez's famous polemic against James I, the *Defensio fidei adversus Anglicanae sectae errores*, while the bulk consists of Suárez's tractates on topics in scholastic moral-theological philosophy with no bearing on international law—and all this in Latin and English. Vanderpol, *La Doctrine scholastique de la guerre* (1915), an excellent study by a devout servant of the Catholic cause, gives in 75 pages all the information (text and comment) on Suárez's teachings pertinent to international law. Incidentally, there is little difficulty in gaining access to Suárez's collected works, of which at least three editions are extant, two of them of the nineteenth century. (The *Selections* give a photographic copy of a 1612 edition the printing style of which is rather difficult for the ordinary reader.)

55. The fact that Spain was the adversary in that case, *supra*, p. 102, may have been a contributing factor.

56. *Supra*, pp. 297, 303, 358, nn. 19, 20.

57. Fruin, "An Unpublished Work on Grotius," *Bibliotheca Visseriana*, V (1925), 3.

58. Introduction, xxi.

59. *Ibid.*, xxxviii.

60. *Ibid.*, xxi. Scott's basis is a remark made by Grotius in a letter to his brother in 1654, quoted by Fruin, *op. cit.*, p. 40. The text does not justify Scott's aspersion, nor is there support in Fruin.

61. Introduction, xxx.

62. *Ibid.*, xxviii.

63. *Supra*, p. 83. Thomas Aquinas, too, was a "liberal": *Spanish Origin* (1934), 280.

64. Grotius did not cite recent authors as much as a modern author would do. Rivier, *Note sur la littérature, etc.* (1883), *supra*, chap. iv, n. 61, wonders why Grotius did not cite the Protestant philosophers. We need not plunge into the moot question whether Suárez's theory of *jus gentium* was known to Grotius at all.

65. Pp. 117–118. See Introduction to Grotius' *De Jure, etc.*, xxviii.

66. Kisters, "Les Fondements du droit des gens," *Bibliotheca Visseriana*, IV (1925), 32.

67. *Catholic Conception*, 127, in the opening of the chapter on Suárez. Kisters's phrase is likewise referred to in the Introduction to Grotius' *De Jure, etc.*, xiv; in "Suárez and the International Community," *Addresses in Commemoration of His Contribution to International Law and Politics* (Catholic University of America, 1933), 45; and—in a different phraseology and without reference to Kisters—in *Spanish Origin* (1934), 4.

68. The distortion is all the worse because Scott gives the phrase the following form: "Dr. Kisters . . . says that after the labors of Suárez the fruit of the international tree was ripe for plucking." But Kisters's phrase quoted above does not mention Suárez. His preceding sentence had merely stated that "the way had been opened" to new legal rules in the international field; and on this account earlier paragraphs had dealt appreciatively with Suárez's doctrine. The twist is subtle but badly misleading.

69. Among other forerunners of Grotius, Kisters lists: Vitoria (without any emphasis), Soto, Molina, Covarruvias, Vasquez, Ayala, the Italians Legnano and Bolognetus, the Frenchmen Connanus and Peter Faber, and the Belgian Lessius.

Apparently he follows Rivier—"Literar-historische Uebersicht, etc.," in Holtzendorff's *Handbuch des Völkerrechts*, I (1888), 395—in the emphasis upon both Gentili and Suárez. He also mentions (p. 37, n. 2) that the law of nature and of nations was known to Shakespeare. To this it may be added that the captive king in Beaumont and Fletcher's play *A King and No King* (1611), Act III, Scene 1, protests his ill-treatment by his captors as violating "the law of nature and of nations." I am indebted for this information to Murray Abend, of Alabama.

70. *Supra*, p. 284. The number of Spanish essays glorifying Vitoria and Suárez, and published since the advent of the Franco regime, is stupendous. See Garcia Arias, appendix to Nussbaum, *Historia del derecho internacional* (Madrid, 1950), 393 ff., 435 ff., 518 ff. Hinejosa's study of the Spanish forerunners of Grotius, in *Anuario de historia del derecho español*, VI (1929), 220, published shortly before that regime, expresses a more moderate view. In 1947 the Spanish Embassy in Washington brought out a pamphlet, *The Law of Nations*, by J. M. Aguilar (O.P.) a member of its staff, with an official introductory statement hailing Vitoria "as the founding father of international law as we know it today." Recently, the University of Valladolid has created a chair in the name of Dr. James Brown Scott.

71. Stadtmüller, *Geschichte des Völkerrechts* (1951), grants to Scott's *Spanish Origin* the asterisk reserved for particularly important works. Von der Heydte, "Franciscus de Vitoria und sein Völkerrecht" translating the subtitle of the 1934 *Spanish Origin*—in *Zeitschrift für öffentliches Recht*, XIII (1933), 239, enthusiastically and uncritically reviews that book, but omits its main title; he probably feels that this would be too much for the German reader. Clementinus a Vlissingen, *De evolutione definitionis juris gentium* (1940), likewise considers Scott as an authority. See also *infra*, p. 304 (Ottenwälder).

72. Regout, *La Doctrine de la guerre juste de Saint Augustin à nos jours* (1934), mentions Scott only in passing on p. 12, and Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts* (1949), does not cite him at all.

73. H. Laski, *American Democracy* (1948), speaking of the contrast between the reality and the appearance of scholarship in public life, states (p. 612): "No one, to take an obvious example among lawyers, would have put Professor James Brown Scott among the really eminent international lawyers. But among the well paid 'promoters' of his subject, few men were, by reason of his position, more sought after or more powerful. And upon few men, accordingly, were lavished more academic honors in proportion to his actual achievements. The key position he held enabled him to exact the tribute that scholarship pays to power." As a matter of fact Scott's career presents, it is believed, a very grave problem. A closer examination of it should be enlightening and fruitful far beyond Scott's particular case.

74. P. 124. In support of his thesis he also cites passages from Nys and Van Vollenhoven, neither of which bears him out. Van Vollenhoven particularly was outspoken on the other side: see, e.g., his "Grotius and Geneva," *Bibliotheca Visseriana*, VI (1926), 12, 32, 44.

75. Van Vollenhoven describes Grotius' use of Roman civil law (cf., *supra*, n. 134 to chap. iv) in a much more limited sense than Ottenwälder.

76. He repeats Scott's irresponsible blame of Grotius for not citing Suárez more frequently. On p. 57 he praises a German writer of the Hitler period who has represented the enthusiasm of the Crusaders as a Christian transformation of the "German war ethos."

77. *Précis de droit international public* (3rd ed., 1937), No. 43. See also n. 71 to chap. vii.

78. Osterrieth, *Josef Kohler: Ein Lebensbild* (1920); Kelsen in *Amer. Journ. Int. Law*, XLIII (1949), 346.

79. The war articles, many of them written for newspapers, are listed in Arthur Kohler, *Josef Kohler Bibliographie* (1931), 120 ff. Special reference may be made to *Deutsche Juristen-Zeitung*, XX (1915), 32, 433, 573 (Lusitania), 939, 1050; XXI (1916), 153, 744; XXII (1917), 458 (against President Wilson); XXIII (1918), 78. The *Bibliographie* lists no fewer than 2,482 items by Kohler.

80. *Grundlagen des Völkerrechts*, 46. The Preface speaks of the English-French jurisprudence, which is "devoid of science."

81. *Ibid.*, 8. On the other hand, Kohler's praise of Spain, Germany's friend of long standing, may well have been influenced by political sentiment.

82. In "Die spanischen Naturrechtslehrer des 16. und 17. Jahrhunderts," *Archiv für Rechts- und Wirtschaftsphilosophie*, X (1916), 235, 242, Kohler states that Suárez's *Defensio fidei catholicae* paved the way for the parliamentary revolution against the Stuarts, but that the parliamentary men, "rejecting the ethical power of the Pope, slid down into the low reaches of a popularism devoid of ideals." In *Lehrbuch der Rechtsphilosophie* (1909) Kohler appears as an ardent advocate of a metaphysical natural-law doctrine along the lines of Catholic tradition. See also *Grundlagen des Völkerrechts*, 7 (IV).

83. The two short sentences about Gentili (*Grundlagen des Völkerrechts*, 41) indulge merely in arbitrary generalizations.

Index

- Aachen, Protocol of, 187
 Abou-Bekr, Caliph, 52
 Absolutism, 124, 126, 150
 Abyssinia, 273; conquest of, 253, 273
 Accretion, 13
 Admiralty, Black Book of, 30; Courts of, 70-71, 99
 Advisory opinions of Permanent Court of International Justice, 272-273
 Aerial navigation, convention on, 257
 Aggression, Soviet definition, 285
 Aggressive war, 141
 Agreements. *See* Treaties
 Air attacks, against civilians, 231
 Air traffic, international, 257, 262
 Aix-la-Chapelle, Treaty of, 46
 Akkadian language, 2
 Alabama case, 218
 Alciatus, 96-97
 Alexander I, Czar, 188
 Alexander IV, Pope, 19
 Alexander VI, Pope, 63
 Algeciras Act (1906), 211
 Alluvion, 13
 Alternate, 197
 Alvarez, 282
 Ambassadors, 26, 95, 111, 122, 125, 137, 154, 178
 American Constitution, 124
 American-Mexican Mixed-Claims Commission, 220, 275
 American Neutrality Act (1794), 133; (1937), 268
 American-Prussian Treaty (1785), 124, 126
 American-Venezuelan Mixed-Claims Commissions, 223
 Amphictyony, 7
 "Analytical School," 233
 Androlepsia, 8
 Angary, right of, 134, 231
 Anglo-American Peace Treaty (1783), 128
 Anglo-American (Jay) Treaty of 1794, 128-129, 214
 Anglo-Brazilian arbitration, 219
 Anglo-Portuguese Treaty (1373), 24
 Anti-Slavery Conference of Brussels (1890), 187, 199
 Anti-War Pact of Non-Aggression and Conciliation (1933), 261
 Anzilotti, 346⁸⁷, 356¹
 Arab literature, 51
 Aragon, 20-22
 Arbitral power of popes, 19
 Arbitration, in antiquity, 2, 7-8; in Middle Ages, 19 (Popes), 24-25; Suárez on, 90-91; Belli on, 92; Gentili on, 96-97; Vattel on, 157; in modern times, 128-129, 217, 220, 257; League of Nations, 257; Soviet view, 286
 Argentina, 212, 213, 216, 228
 Argentræus (Bertrand d'Argentré), 75
 Aristotle, 5, 209
 Armaments, limitation of, 227, 254, 266
 Armed neutrality, 133
 Armenia, 49; Lesser, 57; Kingship of, 19
 Arminius, Dutch theologian, 103
 Arms, in Middle Ages, 18
 Asientos, 128
 Assur, 2, 5
 Asylum, 7, 256, 262
 Athens, 6
Auctoritas principis, 36
 Augsburg, Religious Peace of (1555), 61, 116
 Augustine, St., 35
 Austin, John, 233-234
 Austria, 116, 122, 255; loan of 1922, 257
 Authentica "Navigia," 314⁷⁴
 Authentica "Omnes peregrini," 29
 Autonomous tariff, 204
 Autonomy of the parties, 76
 Aviation, 257, 262
 Avignon, plebiscite, 119
 Ayala, Balthasar, 73, 92-93

- Babylonia, 2
 Bagehot, Walter, 347⁹⁹
 Balance of power, 118, 134, 137-138;
 Phillimore on, 246-247
 Baldus, 40
 Balloons, launching of projectiles, 228
 Bank for International Settlements, 260
 Barbaresques, 123, 128
 Barbarians, 5, 12
 Barbeyrac, 164, 172
 Barbuit's case, 335⁵⁶
 Barter agreements, 264
 Bartolus, 40
 Barton, Clara, 226
 Basel, Peace of (1499), 61
 Basileus, 45
 Beaumont and Fletcher, 361⁶⁸
 Beggars of the sea, 69
 Belgium, 249, 292-293; neutralized,
 190; extradition law, 215; neutrality
 violated by Germany, 230; political
 currents in nineteenth century, 292;
 separation from Holland, 190
 Belgrade, Peace of (1729), 333²¹
 Belli, Pierino, 90-91
Bellum justum et pium, 10
 Bentham, Jeremy, 136, 160-161, 185,
 236
 Bering Sea case, 219
 Berlin, Treaty of (1878), 193
 Bernard, Jacques, 138
 Berne convention (1883, 1886), 213
 Bernstorff, A. P., Count von, 133
 Bernstorff, J. H. E., Count von, 140
Beschränkter Unterthanenverstand,
 178
 Bilateralism in commercial agreements,
 265
 Bills of exchange and checks, Geneva
 uniform laws on, 256
 Bipartite treaties, form, 197
 Bismarck, 193, 196
 Black Book of Admiralty, 30
 Black Sea, neutralization of, 191
 Blackstone, William, 136, 137
 Blockade, of European continent
 (1806), 120-121; of Venezuelan
 coast, 219
 Blockades, effectiveness of, 120, 133,
 192; Bynkershoek on, 170
 Bluntschli, 236, 249
 Bodin, Jean, 76-77
 Bohemia, Kingdom, 21
 Bolívar, 224
 Booty, 40, 52, 69, 99, 170
 Bosphorus, 191
 Bouchaud, 138
 Brazil, 228; rise to independence, 188
 Brazilian-English arbitration, 219-220
 Breisach trial (1474), 320⁸
 Briand, 254
 Brussels Conference (1874), 227
 Bryan, W. J., treaties for advancement
 of general peace, 224
 Bryan-Chamorro Convention, 222
 Bryce, Viscount, 349³
 Buenos Aires, Pan-American Conven-
 tion at, 274
 Bull, *inter caetera*, 63; *Zelo Domus*
 Dei, 116
 Burgundy, Duke of, 22, 32
 Burlamaqui, 164
 Bustamante Code, 261
 Butler and Maccoby, 294
 Bynkershoek, Cornelis van, 167-172
 Byzantium, 45, 47. *See also* Eastern
 Roman Empire

 Cabinet wars, 129
 Cajetan, Cardinal, 83
 Calvinism, 103, 116, 239
 Calvo, Carlos, 216, 245
 Canada, 262
 Canon law, 17
 Capitulation of 1535, 64
 Capitulations, 55, 64, 65, 68, 121
 Capture in maritime war, Hague con-
 vention on (1907), 229
Carta Mercatoria, 28
 Cartels, military, 130; international,
 351⁴⁵
 Carthage, treaties with Rome, 11
 Carthage (S.J.), 320¹⁰
 Casablanca incident, 222
 Central American Court of Justice, 222,
 274
 Ceremonials, 182
 Chaco War, 253
 Chaeronea, battle of, 7
 Chargés d'affaires, 187
 Charity, 85
 Charlemagne, 27, 46, 54
 Charles V, Emperor, 64, 68
 Chateaubriand, F. R., Vicomte de, 207
 Chaumont, Treaty of (1814), 187
 Chevalier, Michel, 204

- Chile, arbitration, 218
 China, 123; antiquity, 3, 4; modern time, 66, 194; relations with Russia, 123; modern settlements in, 195, 228, 318²⁸
 Chivalry, 27
 Choice of law, 141, 212
 Church, in the Middle Ages, 17
 Church Councils, 18, 30-31, 311¹⁹
 Cicero, 15
 Civil law, in England, 75, 100; Suárez on, 86
 Civil Strife, Convention on, 262
 Civis, 299
 Civitas, 72, 109; Vitoria on, 298, 326⁸²; Grotius on, 326⁸²
 Civitas maxima, 153, 158
 Clausula rebus sic stantibus, 76, 96, 203, 285; Machiavelli on, 76; Grotius on, 112, 203; Vattel on, 157; Bynkershoek on, 171, 203
 Clearing agreements, 264
 Clearing procedure for prewar debts, 259
 Coastal waters, Gentili on, 99; Galiani on, 141; Bynkershoek on, 171
 Cobden Treaty, 204
 Code Bustamante, 261
 Codes mixtes, 209
 Codification of international law, 108, 235-236, 258
 Colbert, J. B., 125, 127
 "Cold war," 289
 Comitatus gentium, 141
 Commentators, 40, 41
 Commerce clause of U.S. Constitution, 163
 Commercial arbitration, Geneva treaties, 257
 Commercial treaties. See Treaties of commerce
 Commodity control agreements, 265
 Common law, 30; English, 99, 167; in international cases, 220
 Concert, European, 187
 Conciliation, 25; inter-American, 274
 Concordat, 203
 Conferences, international, 200
 Conflict, of laws, 41, 75; of nationality laws, 350²²
 Confucius, 4
 Congo Conference and General Act, 193-194
 Congresses, international, 200. See also Verona; Vienna
 Conscience, freedom of, 116, 126
 Conscientia libera, 116
 Conscientiae, in foro, 359³³
 Conscientious objectors, Grotius on, 110
 Conseil des prises, 71
 Conservatores, 24
 Consideration, rule of, 145; doctrine, 205
 Consolato del mare, 30, 58, 131
 Constantinople. See Byzantium
 Constitution, American, 36, 137
 Constitutional and international law, 199-200
 Consular jurisdiction, 56, 58, 209; in China and Japan, 195
 Consular treaties, 207-208
 Consules electi, 56
 Consules hospites, 58
 Consules mercatorum, 57
 Consules missi, 56
 Consuls, in ancient Greece, 6; in ancient Egypt, 55; in Turkey, 122-123; in modern times, 125, 207-208; immunity of, 208; statistics, 210
 Consuls general, 209
 Continental Blockade, 121
 Continental System, 121
 Continuous voyage, doctrine of, 132
 Contra bannum, 21
 Contraband, 21, 131, 192, 230
 Contract debts, recovery (Hague convention, 1907), 217
 Conventional tariff, 204
 Conventions. See Treaties
 Convoy system, 133
 Cooling-off period, 224
 Copenhagen, English bombardment of (1807), 121
 Copyrights, 213
 Corps universel diplomatique, 138
 Corpus juris canonici, 17, 37
 Corpus juris civilis, 10, 39-40, 42, 47, 98, 169
 Counterfeiting, 162; of currency, Geneva convention on, 257
 Courtesy, international, 201
 Courts of Admiralty, 28, 68; English, 70-71, 99
 Covarruvias, Diego, 73
 Crimean War, 190, 192

- Crucé, Emeric, 77
 Crusader states, 57
 Crusades, 3, 20, 54
 Custom, 75, 88, 135, 167, 173, 201, 269, 281; in early times, 4; in ancient Greece, 7; Suárez on, 301
 Customs duties, 27, 56, 121, 127, 263.
 See also Tariff conventions
 Customs formalities, convention, 256-257
 Customs parliament, 193
 Customs union, 192, 272
 Czechoslovakian gold affair (1939), 260

 Danube, International Commission of the, 191
 Danzig, free city, 253
 Dar-al-Islam, 51
 Dardanelles, 191
 Dark Ages, 17
 Davy, Humphry, 130
Déclaration des droits de l'homme et du citoyen, 119
Déclaration du droit des gens, 118-119
 Declaration of Independence, 135, 162
 Declaration of war, 27, 91, 229, 313⁵⁸
 Decretum Gratiani, 37
 Deditio, 11
 Defensive war, 141
 Delphi, 7
 Denial of justice, 26
 Deniers of international law, 144, 149, 234
 Deportatus, 14
 Deuteronomy, 33
 Dhimmi, 52
 Diplomacy, 46, 124, 232; school of, 175, 181
 Diplomatic agents, 12; rank of, 187; tax exemptions of, 201
 Diplomatic immunities, 231
 Diplomatic language, 2, 117, 197
 Dispensation, papal, from oaths, 18-19, 96
 Divine right, 84
 Dogger Bank case, 223
 Domestic law, 141
 Dominion of the seas, 99, 111, 168
 Dominions, British, 262
 Double nationality, laws, 350²²
 Double taxation, 199
 Drago doctrine, 217
 Dragomans, 209
Droit d'aubaine, 29, 56
Droit public de l'Europe, 136
 Dualistic doctrine of international law, 235, 278
 Dubois, Pierre, 42-43
 Duel by champions, 27, 313⁵⁸
 Duguit, 279
 Dumdum bullets, 228
 Dumont, Jean, 138
 Dumoulin, Charles, 75
 Dunant, Henri, 224-227, 240
 Dutch East India Company, 102, 358¹⁹

 Eannatum, 1
 East India Company, Dutch, 102, 358¹⁹
 Eastern Roman Empire, 45; treaties with Persia, 47; treaties with Russia, 49-50
 Ecclesiastical law, 17
 Eden treaty, 127
 Egypt, 2-3, 20; in the Middle Ages, 45, 55; in modern times, 209, 216, 262
 Elizabeth I, Queen of England, 68, 74
 Embassies, 95, 138; Grotius on, 111; permanent, 125; Moser on, 177. *See also* Ambassadors
 Emperor. *See* Eastern Roman Empire; Holy Roman Empire
 "Enemy goods, enemy ship," 70
 Enemy property, Vattel on seizure of, 160; in World War I, 231
 "Enemy ship, enemy goods," 70
 "Enemy ship, free goods," 182
 Enghien-Bourbon, Duke of, 121
 England, 74, 117; position in Turkey, 65; ruler of the seas, 121, 132; extradition policy, 215; arbitration, 218
 English civil law, 75, 100, 167
 Enlightenment, 124, 129-130, 135, 150, 161
 Envoys. *See* Ambassadors; Immunity
 Equality of states, 81, 192, 197; Hobbes on, 145; Pufendorf on, 149; Lorimer on, 238
 Erasmus of Rotterdam, 84, 100
 Escape clauses, 265
 Estates, consular administration, 208
 European concert, 187
 Excellency, title of ambassadors, 125
 Excess of power, 223, 276
 Exchange control, 264

- Exequatur, 6, 208
 Export quotas, 207, 265
 External municipal law, 201
 External public law, 179, 182, 237
 Extritoriality, 111. *See also* Ambassadors; Immunity
 Extradition, 2, 24, 48, 123, 201, 214, 215, 255-256, 262

 Fact-finding inquiry, 223
 Fairs, medieval, 29
 Far East, 123, 194
 Fascism, 284
 Fetiales (Feciales), 10. *See also* Jus fetiale
 Feudal law, 22-23
 Feuds, 17, 25. *See also* Private war
 Financial control, 216
 Finnish-Russian dispute over Karelia, 272
 Finnish-Russian War, 253
 Fiore, Pasquale, 244
Foedera iniqua, 11
 Fondaco, 56
 Foreigners, 6, 56, 74, 82, 212, 215, 242; in ancient Greece, 8; in ancient Rome, 13
 Forte case, 219
 France, 117, 118-121; position in Near East, 64; regulation of foreign financing, 216; arbitration, 218
 Franchises, to merchants, 31; unilateral (Moslem), 55
 Francis I, King of France, 44, 64
 Franco-English treaty of commerce (1606), 68; (1713, 1786), 127; (1860), 203
 Franco-German War, 139, 231
 Franco-Spanish extradition treaty (1765), 214
 Franco-Swiss extradition treaty (1777), 214
 Franco-Swiss treaty on private international law (1869), 213
 Franklin, Benjamin, 124, 161
 Franks-Christians, 65
 Frederick II, emperor, 22, 23, 29, 54, 314⁷⁴, 319⁴²
 Frederick the Great, 118, 124, 132, 143, 150-151, 155, 176
 "Free ships, free goods," 131, 133, 170, 182
 Free trade, 204
 Free zone case, 272
 Freedom of commerce, 82, 127, 138, 206, 256
 Freedom of conscience, 116, 126
 Freedom of the seas, 23, 98-99, 103, 111, 206; Bynkershoek on, 170-171
 Freitas, 331¹⁴³
 French language in diplomacy, 117, 197
 French Revolution, 118-119, 224; asylum to foreigners, 215
 French-Swiss alliance (1777), 126, 214
 Friendship and commerce. *See* Treaties of commerce
 Fruin, 302, 324⁶¹
 Fundamental rights of states, 152, 183

 Gaius, 14
 Galiani, Abbé, 140
 General Act, of Anti-Slavery Conference (1890), 187, 199; of Congo Conference, 193-194; for Pacific Settlement of International Disputes, 221, 270
 General-participation clause, 228
 General Postal Union, 198, 221
 General Treaty of Inter-American Arbitration, 274
 Generalization clause, 265
 Geneva Convention (1864), 198, 225-226, 232; extended to maritime warfare and prisoners of war, 227-228, 266; revised (1906), 228
 Geneva uniform laws, 256
 Genoa, 23
 Gentili, Alberico, 94-101, 164; Kohler on, 305
 German-American Peace Treaty (1922), 275
 German Confederation, 186
 German monetary convention (1838), 211
 German-Polish Treaty (1922), 271
 German-Swiss commercial treaty (1904), 263
 Germany, unification, 192; war guilt (World War I), 255
 Gibraltar, 118, 126
 Global significance of international law, 289
 Glosses, 39
 Gold bloc, 263
 Gold standard, 263
 Gondra Treaty, 274

- Grand Design (Sully), 78
 Great Powers, 190, 193
 Greece, 216; ancient, 5-9; uprising against Sultan, 188
 Greek Orthodox, 50, 126
 Greek settlement in Egypt, 3
 Greenland case, 270
 Grégoire, Abbé, 118-119, 135, 158, 183
 Grotius, Hugo, 135, 147, 153; life, 102-106; works, 107-114; Scott on, 302; translations into Russian, 348¹²⁰
 Grotius society, 114
 Guaranty of treaties, 24
 Guicciardini, Francesco, 137
 Gustavus Adolphus, King of Sweden, 105

 Hague Conferences, on Private International Law, 212; on Law of Bills of Exchange and Checks, 256
 Hague Conventions, on civil procedure, 212; on Law and Customs of War on Land, 227, 266-267
 Hague Peace Conference, first, 221; second, 217, 227-228, 229
 Hague treaties on private international law, 212
 Hall, E. W., 247
 Hanseatic League, 28, 33, 61; treaties with Russian princes, 58-59
 Harun al-Rashid, 47, 54
 Havana Conference (1928), 261
 Hay, John, 195
 Heffter, A. W., 243
 Hegel, 236-237
 Hellenistic era, 8
 Henry IV, King of France, 78
 Henry VIII, King of England, 44, 68
 Heretics, 67, 73, 109
 Hessian auxiliary troops, 126
 Hitler, 232, 242, 256, 273, 283
 Hittites, 2
 Hobbes, Thomas, 135, 144-146, 148, 149
 Holland and Belgium, separation, 190
 Holtzendorff, Franz von, 294
 Holy Alliance, 188, 189, 190
 Holy Inquisition, 63, 94
 Holy Places (Palestine), 65, 122
 Holy Roman Empire, 12, 21, 40, 45, 115; dissolution of, 120
 Holy war, 51
 Hosack, 356¹
 Hospitals, protection, 131, 225, 228
 Hostages, 24
 Huber, Ulrich, 141
 Huebner, Martin, 140, 170
 Human law, Suárez on, 85; Grotius on, 109
 Hume, David, 135
 Hungary, 46, 275-276
 Hyde, C. C., 282

I'm alone case, 273
 Immunity of envoys, 4, 12, 14, 26, 47, 68, 289; Gentili on, 95; Grotius on, 111; Pufendorf on, 149; in World War I, 231. *See also* Ambassadors
 Imperfect rights, 82, 152, 158, 182
 Import quotas, 265
Index librorum prohibitorum, 95, 114
 India, ancient, 3
 Indians, American, 79 ff.
 Industrial and literary property, 213
 Infidels, power of the Church over, 322⁴¹
 Innocent X, Pope, 116
 Institut de Droit International, 249
Instructions for the Government of Armies of the United States, 227
 Inter-American Arbitration Treaty (1929), 274
 Inter-American system, 351³²
Inter caetera, bull, 63
Intercursus Magnus, 32
 Interdependence of states (Suárez), 88
 "International," term, 136
 International administration, 282; de Martens on, 249
 International Bank for Reconstruction and Development, 260
 International bills of rights, treaties, 204, 263
 International Bureaus, Telegraphic Administration, 198; Industrial Property, Literary Property, 213; Weights and Measures (Paris), 341²⁰
 International Commissions, of Inquiry, 223; for Air Navigation, 257
 International Convention on Railway Freight Traffic (1890), 198, 221
 International Court of Justice, 269
 International financial control, 216
 International Labor Organization, 258-259

- International law, 136, 233; English conception, 74, 137, 221; American conception, 282. *See also* Law of nations; Private international law
- International Meter Convention, 341²⁰
- International Monetary Conference, 211
- International Office of Public Health, 199
- International Opium Convention, 341²¹
- International organization, 282
- International Peace Congress (1843), 240
- International Radio Telegraphic Convention, 198
- International railway freight traffic, 198, 221
- International rivers, 186
- International Union of American Republics, 190, 261
- Intervention, 119, 188-189; von Martens on, 183; Monroe Doctrine, 189; Hegel on, 237; Phillimore on, 247
- Iraq, 262
- Ireland, conquest, 19
- Iroquois, 1
- Isaiah, 3
- Isidore of Seville, 36
- Islam, 51
- Isolationism, 206
- Isopolities, 6
- Italy, in Middle Ages, 29, 55; unification, 192, 241; civil code of (1865), 241
- Ivan IV, the Terrible, 50
- Jacob, Berthold, case, 273
- James I, King of England, 74, 85, 94, 239
- Japan, 66, 123, 195; in League of Nations, 252; invasion of Manchuria, 252; Kellogg Pact, 254
- Jay Treaty, 129, 214
- Jellinek, Georg, 234
- Jerusalem, Kingdom, 57
- Jews, 3, 52, 126, 171, 354⁸⁷
- Jihād, 51
- John, King of England, 22
- Joppa, Compact of, 23, 54
- Judicial assistance, 214
- Judicial theory of war, 120; Suárez on, 90
- Judiciary consuls, 58, 208
- Jus albinagii*, 29
- Jus civile*, 13
- Jus de non appellando*, 77
- Jus fetiale*, 11, 165
- Jus gentium*, 13-14, 28, 135, 298, 309²⁷, 315³³; Isidor of Seville on, 36, 39; Vitoria on, 80, 81, 358³²; Suárez on, 86, 88, 302; Gentili on, 98; Grotius on, 109; Hobbes on, 135, 145-146; Pufendorf on, 148; Zouche on, 165; Rachel on, 172; Bynkershoek on, 168; revival, 269
- Jus humanum* (human law), 85, 109
- Jus inter gentes*, 165, 166, 182
- Jus militare*, 36
- Jus naturae*. *See* Law of Nature
- Jus naturae et gentium* (Grotius). *See* Law of nature and of nations
- Jus naturale*. *See* Law of nature
- Jus necessarium*, Wolff on, 153
- Jus positivum*, 136, 148, 181
- Jus soli*, 299
- Jus voluntarium*, Wolff on, 153
- Just war, Roman law, 10; in Middle Ages, 35, 37; Thomas Aquinas on, 36; Greek-Orthodox Church, 49; Spanish concept, 72; Vitoria on, 80-82; Suárez on, 89, 300; Ayala on, 92; Gentili on, 95; Grotius on, 107, 110, 112; and balance of power, 137; Wolff on, 153-155; Locke on, 164; Zouche on, 167; Bynkershoek on, 171; Rachel on, 174; G. F. von Martens on, 182-183; in recent times, 232, 277; Lorimer on, 239; Soviet theory on, 287
- Justiciable controversies, 157, 271
- Justinian, 48
- Kaiser, extradition, 114, 256
- Kaltenborn, von, 136, 292
- Kant, Immanuel, 136, 143
- Karelia, Western, 272
- Kellogg Pact, 254
- Kelsen, 280
- Kent, James, 245
- Khazars, acceptance of Jewish faith, 46
- Kiakhta, Peace of (1727), 123
- Klüber, 243
- Knights Hospitalers, 26
- Kohler, Joseph, 305, 356¹
- Kontore (Hanseatic League), 34, 59

- Koran, 51, 56
 Korovin, 288
 Koster, J., 303
 Kowtowing, 123
 Krabbe, 278
 Kuchuk-Kainarji, Peace of (1774), 122

 Labor, international protection, 199
 Lagash, 2
 Lampredi, G. M., 140
 Landeshoheit, 116, 124
 Landfrieden, 22
 Las Casas, Bartholomew de, 79
 Lateran Church Council, Second, 18;
 Third, 18, 30-31, 311¹⁹
 Latin America, 188, 194, 213, 222, 224,
 274, 282
 Latin Monetary Union, 211, 263
 Laurent, François, 292
 Lauterpacht, 247, 282
 Law, positive, 148
 Law and Customs of War on Land,
 convention, 227
 Law Merchant, 28, 75, 137
 Law of nations (*droit des gens*, *Völkerrecht*), 1, 5, 13, 75, 115, 196; in
 U.S. Constitution, 124; Kant on,
 144; Rachel on, 173; Moser on, 177,
 179; general, 182; Hegel on, 237;
 universal, 289. *See also* International
 law; *Jus gentium*
 Law of nature, 15, 16, 135, 232-233,
 276, 277, 283; Thomas Aquinas on,
 38; Suárez on, 85, 87; Gentili on, 98;
 Grotius on, 108-109; Hobbes on,
 145; Pufendorf on, 148; Wolff on,
 152; Rachel on, 173; Moser on, 176;
 Martens on, 182; Bentham on, 185;
 Lorimer on, 238
 Law of nature and of nations, 75, 107;
 university chairs, 113, 147, 172, 249
 Law of the land, 137, 234
 League of Nations, alleged forerunners,
 44, 142-144; Covenant, 189, 251,
 253; economic policies, 256
 Lebensraum, 283
 Le Fur, 305, 353⁷¹
 Legists, 322⁴⁶
 Legnano, Giovanni da, 328¹¹³
 Leibniz, 138
 Lena Goldfields case, 286
 Lenin, 287
 Leo III, Pope, 21
 Letters of marque and reprisals, 69, 99
 Lieber, Francis, 227
 Liège, neutrality treaty (1492), 70
 Lincoln, Abraham, President, 227
 Liszt, Franz von, 243-244
 Literary property, treaties, 213
 Living space, 283
 Locarno Pact, 254
 Locke, John, 161, 164
 London, Treaty of (1871), 191
 London Naval Conference, 230
 London Sea Law Declaration, 230
 Long-distance blockade, 230
 Lorimer, James, 238
 Lotus case, 271
 Louis XIV, King of France, 117, 143
 Lübeck, 33
 Lusitania, 231
 Luther, 358¹⁹

 Mably, Abbé de, 139
 Macedonia, 7
 Machiavelli, Niccolò, 76
 Macht theorists, 238
 Madrid, Peace of (1526), 67; interna-
 tional conference at (1880), 193
 Magna Carta, 22-23, 28
 Manchuria, invasion of, 252, 254
 Mancini, P. S., 100, 240, 249
 Mandates, 253, 254, 298
 Mansfield, Lord, 137
 Manu code, 3, 9
 Marcus Aurelius, emperor, 12
 Mare liberum, Grotius on, 103, 111
 Maritime law, 29, 98-99, 125, 138;
 Paris Declaration of, 192
 Marriages, consular, 208
 Marshall, John, Chief Justice, 160
 Martens, F. de, 219, 248
 Martens, G. F. von, 139, 179-185; *Re-
 cueil des principaux traités*, 139
 Marx, Karl, 286-287
 Materialism, scientific, 286-287
 Mathematical method, 155
 Maurice, Prince of Orange, 104
 Mayence, Treaty of (1632), 70
 Medical care for soldiers, 130
 Medici, Cosimo de', 58, 67
 Meiji, Emperor of Japan, 195
 Menchaca, Fernando Vazquez de,
 323⁵⁹
 Mendoza case, 68, 74, 94
 Mercantilism, 125, 127

- Mercenaries, 62, 70; Pufendorf on, 149;
 Vattel on, 160
 Merchants, foreign, 27, 130
 Mercia, 27
Mercure historique et politique, 178
 Mesopotamia, 1
 Methuen treaty, 127
Metoikoi, 6
 Metternich, Prince, 188
 Mexican mixed-claims commissions,
 220, 275
 Middle Ages, 17 ff.
 Mikado, 195
 Military deserters, extradition, 214
 Military law, 91
 Minorities, national, 126, 253
 Mixed arbitral tribunals, 275
 Mixed-claims commissions, 218, 220
 Mixed tribunals, Egyptian, 209, 262
 Mohammedan law, 51
 Mohl, Robert von, 161
 Molina, Luis, 91
 Molinaeus, Carolus, 76
 Monetary treaties, 5, 33, 210, 263
 Monetary world crisis, 263
 Mongol invasion, 51
 Monistic doctrine of international law,
 278
 Monroe Doctrine, 189
 Montenegro, 193
 Montesquieu, 1
 Montevideo, Treaties, 212
 Moral theology, 37, 83, 108
 Morality, and law, 233-234
 Morocco, 123, 194, 209, 222; State
 Bank, 211
 Moscow "Third Rome," 50
 Moser, J. J., 175-179, 182
 Moslem, 47, 51-52, 54
 Most-favored-nation clause, 33, 122,
 127, 204, 205, 262, 265, 300
 Motor vehicles, convention, 198
 Municipal law, 118, 136, 166, 234, 235,
 242
 Municipal legislation on foreign affairs,
 231; nineteenth century, 196, 200
 Münster, Peace of, 117, 171
 Mussolini, 253, 273, 284, 352⁵²
Mustamin, 53

 Nanking, Treaty of (1842), 194, 195
 Nansen passport, 258
 Naples, Kingdom, 22, 120
 Napoleon I, 120
 Napoleon III, 204; expedition against
 Mexico, 189, 216
Natio, nation, 326⁸³
 National Assembly, French (1789),
 119
 National Socialism, 132, 284
 National states, rise of, 61
 National-treatment clause, 33, 206, 263
 Nationalist school of thought, 169
 Nationality principle, 120, 240, 299
 Natural law. *See* Law of nature
 Naturalists, 135, 147, 148-164
 Nature, state of, 144
 Naucratis, 3
 Naval armaments, limitation of, 266
 Navigation Act (1651), 126-127, 206
 Negotiable instruments, 29
 Nerchinsk, Peace of (1689), 123
 Netherlands, 62, 117; War with Spain,
 62, 93; in Japan, 66; War with Eng-
 land, 117; Treaty with U.S. (1785),
 126; "Wagoners of the Seas," 131;
 literature on private international
 law, 141; "provinces," 169; separa-
 tion from Belgium, 190
 Neuilly, peace treaty, 251
 Neutrality, 62, 70, 120, 131, 133, 139,
 231; Grotius on, 112; "armed," 133;
 Galiani on, 140; Huebner on, 140;
 Vattel on, 157; Bynkershoek on, 169-
 170; under Hague Convention
 (1907), 229; in World War I, 230,
 231-232; after World War I, 267-
 268, 277
 Neutrality Act, U.S.A. (1794), 133-
 134; (1937), 268
 Neutrality treaties, Soviet Union, 285
 Neutralization, of Belgium, 190; of
 Black Sea, 191
 Neutrals in war on land and on sea, pro-
 tecting prisoners of war, 227; Hague
 convention (1907), 229; in World
 War I, 231
 New Deal, 265
 Nicholas II, Czar, 227
 Niebur Peace (1392), 59
 Nobel Peace Prize, 227
 Nobility, in science of international law,
 250
 Nonbelligerency, 268
 Nonintervention, 189
 North German Federation, 193

- Norwegian compensation case (1922), 273
 Novgorod, 59
 Nys, Ernest, 293, 300, 324⁶¹
 Nystad, Peace of (1721), 118
- Oath, in antiquity, 2, 10, 18; papal dispensation, 18; in Middle Ages and later, 18, 126; Islam, 54; administered by consuls, 208
 Obscene publications, suppression, 258
Occupatio, 13
 Occupation, of newly discovered territory, 67, 157; military, 227-228
 Oldenbarneveldt, 104
 Oldendorp, Johann, 324⁷¹
 Oléron, Rolls of, 30
 Ompteda, von, 291
 One world, 289
 Open door (China), 195
 Opium traffic, 258
 Oppenheim, F. L., 247, 282
 Optional clause, 270
Ordonnance touchant la marine (1681), 125, 131
Ordre public, 142
 Orthodox Church, 46, 49, 122
 Ostrogoths, 46
 Ottawa Conference, 263
 Ottenwälder, 304
 Ottoman Empire, 64, 121-122, 125, 190-191; mixed tribunals, 209; financial control, 216. *See also* Capitulations; Islam
 Oxenstierna, 105
- Pacifism, 240
 Palmerston, Lord, 217
 Pan American convention, Buenos Aires (1936), 274
 Pan American Union, 261, 274, 282, 351³²
 Panama, Agreement of (1826), 349²
 Papal legates, 187, 312⁴⁰
 Papal states, 225-226; annexation (1870), 192
 Paraguay, 253
 Paris, Treaty of (1856), 190; Declaration of Maritime Law, 192, 197-198
 Paris (Kellogg) Pact for the Renunciation of War, 254
 Parker, E. B., 275
- Parliamentary form of government, influence on treaties, 199
 Pashukanis, 288
 Passage, right of, 112, 134, 180
 Passarowitz, Peace of (1718), 122
 Patents, 213
 Patriarch, Constantinople, 46, 52; Moscow, 50
 Paul V, Pope, 85
 Peace of the land, 22
 Peace societies, 239-240
 Peace treaties, by primitives, 4; in ancient Greece, 5; under Islam rule, 53; Wolff on, 152. *See also* Utrecht, Westphalia, etc.
 Penn, William, 142
 Pentarchy, 187
 "Peoples of the book," 52
 Perfect rights, 152; Vattel on, 158
 Periodicals, 249, 282
 Permanent Court of Arbitration, 221
 Permanent Court of International Justice, 257, 268-274
 Permanent embassies. *See* Embassies
 Perpetual peace projects, 42, 76, 77, 142
 Perry, Matthew C., 195
 Persia, Treaty with Byzantium (562), 48, 126
 Personality of law, principle of, 34, 41
 Peru, arbitration, 218
 Peter the Great, 118, 125
 Philip II, King of Spain, 63
 Philippines, 63, 262, 323⁵¹
 Phillimore, Sir Robert, 246
 Pietists, 175
 Piracy, 9, 30, 56, 67, 128, 202; French-English agreement on (1517), 68; Gentili on, 68, 99; Bynkershoek on, 128
 Pisa, 55, 57, 58
 Plato, 9
 Plebiscite, in French Revolution, 119; under League Covenant, 253
 Pledging of territories, 24
 Podebrad, George, King of Bohemia, 43
 Poisoned weapons, 18, 228
 Poland, 271; partition, 126; in Gold Bloc, 263; occupation of Vilna, 349⁵
 Political crimes, 215
 Popes, conferring of titles, 19, 67; legal supremacy in Middle Ages, 22-23

- Popular sovereignty, 158
Populus (Gaius), 14; (Suárez), 87; (Grotius), 109
 Porter convention, 217
 Portugal, 111; treaty with England (1373), 24, (1703), 127; Spanish rule, 62
 Positivism, 140, 172, 235-236; von Martens on, 181; nineteenth century, 232; Austin on, 234; Heffter on, 243; twentieth century, 276
 Positivists, 135, 164-185
 Postglossators, 40, 305
 Pradier-Fodéré, 236, 244
 Precedence, 78, 115, 125; Rousseau on, 125; Pufendorf on, 150
 Predestination, doctrine of, 103
 Prescription, 13, 219
 Prewar debts, 259
 Priests, inviolability (Greece), 9
 Primitives, 1
 Prisoners of war, 130; under Moslem law, 52; protection, 227; treaties, 229; Geneva Convention (1929), 266. *See also* Slavery
 Private international law, 40, 141, 261; Suárez on, 89; Montevideo and other treaties, 212; law of nations, 232-233; Mancini on, 241; Savigny on, 242
 Private war, 17, 25, 72; Grotius on, 107. *See also* Feuds
 Privateering, 26, 69, 99, 128, 192; Gentili on, 99
 Prize courts, 70, 132, 140; Moser on, 177; international, 229
 Prize law, 31, 170
 Probabilism, 167, 328¹⁰⁸
Professione juris, 41
 "Protection" by diplomatic or consular agents, 209
 Protectionism, 204
 Protective tariffs, 204
 Protocol of Aachen, 187
Proxenoï, 6, 58
 Provinces, Netherlands, 169
 Prussian-American Treaty (1785), 124, 126, 130
 Public health, international office, 199
 Public international law, 233
 Public policy, 142
 Pufendorf, Samuel, 147-150
 Punitive war, 331¹³⁴
 Pure theory of law, 280
 Pyrenees, Peace of (1659), 131
 Quotas, 266
 Rachel, Samuel, 172
 Radio telegraphic convention, 198
 Railways, international regime, 257
 Rameses II, of Egypt, 2
 Ransom of prisoners, 27, 47, 69, 130, 131
 Rapallo, Treaty of, 286
Rappenmünzbund, 33
 Reason, formative role in international law, 277
Rebus sic stantibus. *See* *Clausula rebus sic stantibus*
 Reciprocal trade agreements, 265
 Reciprocity, 28, 55, 60, 120, 123, 141, 195, 200
Recueil des principaux traités, 139
 Red Cross, 225; Geneva Red Cross Conference (1863), 200; unauthorized use, 229; Geneva Convention 1929, 266
 Redslob, 295
 Reformation, 61; Scott on, 296, 301
 Regional developments, 210, 282
 Regional understandings, 189
 Reichstag, 193; Committee of Inquiry, 345⁷⁹
 Religious minorities, protection, 126, 193
 Renunciation of war, Kellogg Pact, 254
 Renunciation of wars of conquest, French Revolution, 119
 Reparations, settlement, 260
 Reprisals, in Greece, 8; in Middle Ages, 25, 59; Bartolus on, 40; in Turkey, 64; Vattel on, 160; in World War I, 231
Respublica, 72; Vitoria, 81, 84, 87
Revue de droit international et de législation comparée, 249
 Rhine Navigation Act, 186
 Rhodian sea law, 30
 Richard III, King of England, 58
 Richelieu, Cardinal, 105
 Right of passage, 134
 Rio de Janeiro, Resolution, 268
 Rivers, international, 186
 Rivier, 114, 292, 347¹⁰⁸, 360⁶⁴

- Rolls of Oléron, 29-30
 Roman law, 13-14, 41; in England, 12, 74. *See also* Civil law
 Rome, under Byzantine Empire, 45
 Rousseau, J. J., 139
 Rozhdestvenski, Admiral, 223
 Rubber convention (1934), 266
 Rule of 1756, 132
 Rumania, 191, 276
 Russia, 118, 122; Papal grant of kingship, 19; medieval, 49, 51; Byzantine relations, 49-50, 128; relation to China, 123; armed neutrality, 133; Black Sea, 191; arbitration, 218; literature on international law, 248. *See also* Soviet Union
 Russian-Turkish War (1877), 193
 Rutherford, Thomas, 164
 Ryswick, Peace of (1697), 126

 Sa, Don Pantaleon, case of, 165
 Saar Basin, 253
 Saavedra Lamas Treaty, 261, 274
 Sacrament, 18
 Saint-Germain Peace Treaty, 251
 Saint-Pierre, Abbé de, 142
 Sanitary Conferences, 1851 and 1859, 342²⁹
 Sanitary convention, 199
 Santo Domingo and Haiti controversy, 274
 Saracens, 20, 21, 54, 73; Vitoria on, 81; Gentili on, 97; Grotius on, 110
 Saragossa, Treaty of (1529), 63
 Savigny, F. C. von, 242
 Scandinavian Monetary Convention, 211
 Scheldt River, opening, 120
 Schmitt, Carl, 283, 284
 Scholastics, 15, 42, 73, 84, 91; method of proof, 42, 75; influence on Grotius, 108
 Schücking, 345⁷⁹
 Scotch school of thought, 239
 Scott, J. B., 74, 296
 Selden, John, 111
 Self-limitation, theory of, 235
 Senate (U.S.), 199; and Permanent Court of International Justice, 268-274
 Sepúlveda, Juan de, 81
 Serbia, 193
 Seven Years' War, English capture of enemy goods, 132
 Shakespeare, 361⁶⁹
 Shimonoseki, Peace of (1895), 196
 Shipwreck, law of, 31
 Shogun, 195
 Siam, 196
Siete Partidas, 52, 62
 Silesian Loan, 132
 Slave trade, 50, 128, 258; conventions on, 128, 186, 258
 Slavery, 328¹⁰² (Suárez)
 Social psychology, 280
 Socrates, 9
 Solferino, Battle of, 224
 Solidarity, Duguit on, 280
 Soto, Domingo de, 73, 323⁵⁸
 Sovereignty, 13, 72, 116, 119, 278; Bodin on, 77; Grotius on, 331¹⁴⁰
 Soviet Japanese Treaty (1945), 285
 Soviet Union, 261, 285; expulsion from League of Nations, 253; in International Labor Organization, 259; project on prisoners of war, 267; "non-aggression treaties," 285; legal theory, 286; 1923 and 1936 Constitutions, 287; literature on international law, 287. *See also* Russia
 Spain, hegemony, 62, 117; and Netherlands, 117; under totalitarian regime, 284, 303; and Empire, 311²⁶
 Spanish-Portuguese Treaty (1750), 63
 Spanish school of international law, 71, 284, 295, 303
 Spanish Succession, War of, 117
 Spinoza, Benedict, 66, 146
 Spoils in war, 302
 Stabilization fund, 264
 Stabilizing agreements, 263
 State, concept, 71-72, 77, 145, 279, 280
 State of nature, 119; Hobbes on, 145
 Statelessness, 300
 States-General, Netherlands, 93
 Statute of Westminster, 262
 Statutes, theory of, 242
 Steel yard, 34
 Stein, Lorenz von, 282
 Sterling bloc, 264
 Sterne, Laurence, 130
 Stimson Doctrine of Nonrecognition, 254
 Stoic philosophy, 15

- Story, Joseph, Justice, 160
 Stowell, Lord, 132
 Stratagems (Thomas Aquinas), 38
 Strozzi, Lorenzo, consul in Pisa, 58
 Suárez, 73, 84-91, 362⁸²; Scott on, 297, 300
 Sublime Porte, 121, 125, 190-191
 Submarine warfare, 231, 267
 Succession to the throne, Zouche on, 166
 Sugar conventions, 207, 265
 Suleiman the Magnificent, 64
 Sully, Duke of, 78
 Sumerian language, 1
 Supremacy of international law, 279, 280
 "Suzerain," 23, 46, 123
 Sweden, 118, 122, 133
 Swiss-French treaties (1777), 214; (1869), 213
 Switzerland, 61; independence, 62; neutrality, 62, 187
 Tacit condition of oath, 18
 Talbot, Lord, 137
 Tariff conventions, 33, 204, 206, 262.
 See also Customs duties
 Tariff war, 34, 204
 Taube, de, 295
Temperamenta of warfare, Grotius on, 110
 Tertullian, 35
 Tetrarchy, 187
 Textor, J. W., 174
 Theologians in international law, 73, 92, 304
 Thirty Years' War, 105, 115, 117
 Thomas Aquinas, 36-38; on law of nature, 38; on *jus gentium*, 39
 Thomasiaus, Christian, 338¹⁰²
 Tilsit, Treaty of, 121
 Tin convention (1937), 266
 Titles, conferred on princes, 19
 Tolerance, 126; Grotius on, 110
 Tolstoy, Leo, 248
 Tordesillas, Treaty of (1494), 63
 Total war, 231
 Totalitarian regimes, 263
 Transfer-saving agreements, 264
 Treaties, in antiquity and Middle Ages, 4, 6, 291; Islamic doctrine, 53; law-making, 67, 198, 202; Suárez on, 87; Gentili on, 95; with non-Christian rulers, 110; Grotius on, 111-112; violation of, 117, 203; American Constitution on, 124; in modern times, 127, 204, 264; collections, 138; Spinoza on, 146; Pufendorf on, 149; Vattel on, 157; Bynkershoek on, 168, 171; law of, 196; form, 197; multipartite, 197, 202, 261, 274; collective, 198; open, 198, 202; organizational, 198, 202, 213; monetary, 210. *See also* Utrecht, Westphalia, etc.
 Treaties of commerce, in Rome, 11-12; in Middle Ages, 32; in modern times, 122, 124, 127, 138, 203-205, 263
 Treaty ports, 194
 Trianon, Peace Treaty, 251, 275
Tribunal de la Connétablie, 69
 Tribunals, mixed, 209; arbitral, mixed, 218
 Triepel, Heinrich, 235
 Trinity, invocation, 126
 Tripartite agreement, 264
 Triple Alliance of Germany, Austria, and Italy, 196
Triquet v. Bath, 329¹²⁴, 335⁵⁶, 338¹⁰⁷
 Truces of God, 17
 Trujillo, agreement of, 224
 Tunisia, 216
 Turkey. *See* Ottoman Empire
 Two-camps theory, 287
 Two swords, theory of the, 42
 "Two worlds," 289
 Ulpian, 15, 36
 Umma, 1-2
 Union of Soviet Socialist Republics.
 See Soviet Union
 United Nations, 253
 United States, Constitution, 124; Treaty with Prussia (1785), 124, 126; early contributions to international law, 124, 129, 134; Treaty with Netherlands (1782), 126; Declaration of 1856, 192; Congo Conference, 193-194; Senate, 199; in multipartite treaties, 199, 206; copyrights and patents, 213; economic policies, 265
United States v. Arjona, 162
 Universal law, 14, 36, 86, 98, 148
 Universal Postal Union, 198
 Universal Telegraphic Union (1865), 198

- Universities, courses in international law, 113, 147, 172, 249
 Upper Silesia, 253
 Usages, 182, 201. *See also* Custom
 Utrecht, Treaty of (1474), 35; Union of (1579), 62; Peace of (1713), 117, 126, 127, 131, 137, 142
 Vanderpol, 360⁵⁴
 Van Vollenhoven, C., 304, 356¹
 Varangians, 49
 Vasquez, Gabriel, 91
 Vassalage, 2, 11, 63
 Vattel, 156-164
 Venezuela boundary case, 219
 Venezuela case (1904), 222
 Venice, embassy, 26; rule over sea, 31, 57; trade with Saracens, 55; consuls, 57; independence, 311²⁸
 Verona, Congress, 187, 189
 Versailles, Peace Treaty, 251
 Vico, Giambattista, 114
 Vienna, Congress and Peace of (1815), 186
 Vilna, occupation by Poland (1920), 349⁵
 Vishinsky, 286, 290
 Visigoths, 28
 Visit and search, 30, 133, 187, 230; Vattel on, 157
 Vitoria, 73, 79-84; Scott on, 297
 Voet, Johannes, 141
 Voet, Paul, 141
 Völkerrecht, 176, 237. *See also* Law of nations; International law
 "Wagoners of the Seas," 131
 Wal-Wal case, 273
 Walachia and Moldavia, 191
 Walker, T. A., 294
 War, private, 17, 37; judicial theory of, 90; Rousseau on, 139; aggressive, 141; Hegel on, 237. *See also* Just war
 War criminals, in World War I, 256; in World War II, 114, 202
 War guilt, for World War I, 255; for World War II, 277
 War of the Austrian Succession, 132
 War of the Spanish Succession, 117
 War on Land, Hague Convention on Laws and Customs of, 227
 War zones, in World War I, 230
 Ward, Robert, 291
 Warfare, 69, 231; in ancient Orient, 5; in ancient Greece, 9; medieval, and Church law, 18; Moslem law, 51; humanization of, 69, 130, 224, 266; *temperamenta* of, 110; maritime, 131; Rousseau on, 139
 Washington Rules, 218
 Washington Treaty for Limitation of Naval Armaments, 266
 Wegner, 295
 Westlake, John, 247¹⁰⁶
 Westphalia, Peace of (1648), 62, 115; Kingdom of, 180
 Wharton, Francis, 354⁷⁹
 Wheaton, Henry, 246, 291
 Wicquefort, Abraham van, 138
 William II, German Emperor, extradition, 114, 256
 William of Orange, 93
 Wilson, Woodrow, President, 251
 Wimbledon case, 271
 Winkler, Benedict, 324⁷¹
 Wolff, Christian, 150-156
 Wolsey, Cardinal, 44
 Women and children, traffic in, 199, 258
 Women in industry, night work, 199
 World War I, 230
 World War II, 114
 Wounded soldiers, protection of, 120, 198, 224
 Zambales, war against, 323⁵¹, 327⁸⁶
 Zelo domus Dei, bull, 116
 Zollverein, 192
 Zouche, Richard, 165-167

44 41
151

152

152